United States Circuit Court of Appeals,

FOR THE THIRD CIRCUIT.

John Strohm, Plaintiff in Error,

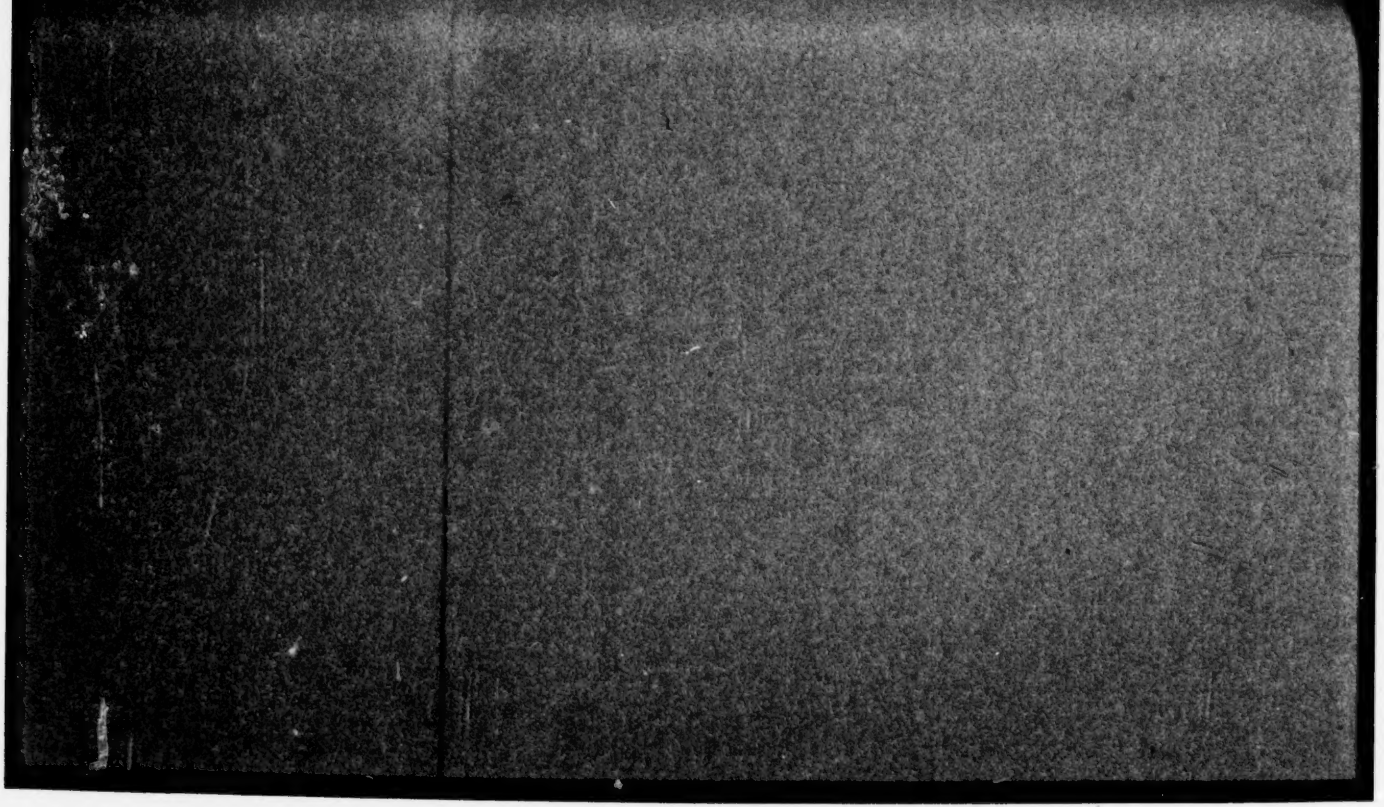
vs.

Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading under the firm of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS IN ERROR.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Defendants in Error.



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September Term, 1898.

No. 33.

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BRIEF FOR DEFENDANTS IN ERROR.

COUNTER STATEMENT.

The history of the case, in the brief of the plaintiff in error, contains some errors.

It is true that the suit grows out of a contract for the sale and delivery of hops made by a firm of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, trading as Horst Brothers, with John Roehm, a brewer. This was substantially one contract for a five years' supply of hops, but the delivery for each season of five months was embodied in a separate written paper, all ten of the papers, however, being

executed at the same time, in pursuance of the one agreement. (Record, folios 97, 98, printed page 54.) The contract provided for the delivery of a certain quantity and specified grade of hops each month, with a provision that any difference of opinion as to quality should be submitted to arbitrators mutually chosen.

It is not true, as stated in the history of the case in plaintiff in error's brief, that this contract was entered into at the solicitation of Paul R. G. Horst, and in reliance upon his expert knowledge. On the contrary, the defendant, Roehm, himself testified (Record, folio 98, printed pages 54, 55) that this contract was made with E. Clemens Horst, and it was also the uncontradicted evidence that E. Clemens Horst was the member of the firm who did all the selecting and purchasing of Pacific Coast hops for the firm (Record, folio 139, printed page 78); and it was also the evidence of the defendant himself (Record, folio 100, printed pages 55, 56) that so far from relying upon the judgment of Horst Brothers, or of any partner, it was his practice to take samples of the shipments, submit them to an expert and accept or reject the shipments upon the report of such expert.

It is true that on June 23d, 1896, after three years' deliveries, covered by six of the papers, had been made, the firm of Horst Brothers dissolved. This dissolution took place by the retirement of one partner, Paul R. G. Horst, the other two partners continuing the business under the same firm name. The retiring partner assigned his interest in the Roehm contract to his copartners, and commenced a new business on his own account. The remaining partners of the firm of Horst Brothers were at all times ready and willing to continue to fill the contract with Roehm, and in point of fact sent to him the next shipment due under it. He not only refused to receive this, but in letters from himself and his counsel (Record, folios 15, 16 and 17, printed pages 10–12) declared in the most explicit terms, and against the protest of Horst Brothers, that he would not carry out the contract for the two remaining years covering two hundred bales of the crop of 1896 and two hundred bales of the crop of 1897 and included in the four remaining

papers, and that he would treat this contract as at an end, and purchase his supplies elsewhere. Thereupon the present suit was commenced by the three partners of the original firm, to the use of the two remaining partners, to recover damages.

BRIEF OF ARGUMENT.

The case will be considered under the four propositions contained in the brief of plaintiff in error :—

First.—IS THE FIRST PROPOSITION OF THE PLAINTIFF IN ERROR CORRECT, VIZ., "THE DEFENDANT WAS NOT REQUIRED "TO ACCEPT PERFORMANCE FROM THE ASSIGNEES OF THE PAR- "TIES WITH WHOM HE HAD CONTRACTED?"

It is not necessary to examine in detail the cases cited by the plaintiff in error, since they will be found to group themselves in two classes, viz., first, cases in which there was an attempt to sue by a legal plaintiff, who had no contract at all with the legal defendant; and, second, cases in which the contract was of such a personal character that it formed an exception to the general rule of assignability of contracts.

Of the first class, the case of

Humble *vs.* Hunter, 12 Q. B., 64 E. C. L., 310,

is an example. In that case the charter party was made between C. J. Humble, owner, and Jameson Hunter. The suit was brought by Jameson Hunter against *Grace* Humble, and it was attempted to justify the suit by proof that Grace Humble was the real owner. The conclusive answer to the suit was that whatever might have been the rights of the plaintiff against the defendant in the suit, he could not recover against such defendant upon a charter party to which the defendant was not a party.

The cases of Bolton *vs.* Jones, Boston Ice Co. *vs.* Potter, and National Bank *vs.* Hall, cited by plaintiff in error, fall within the same class. They were all cases where the legal plaintiffs, who were not parties to the contract, sought t-

recover on the ground that the contract was really with them, a ground which of course failed with the production of the contract.

Of the second class of cases, the case of

Arkansas Smelting Co. *vs.* Belden Mining Co., 127 U. S., 379,

cited by plaintiff in error, is a good example. In that case the vendor of certain lead ore had a contract by which, before payment, the ore was delivered to the vendees to be assayed and the amount of various minerals contained therein ascertained. The vendees assigned their entire contract to a stranger, and it was held that the peculiar provisions of the contract which involved the delivery of the ore to the vendees for assaying, and the intrusting of the ore to them prior to the ascertainment of the price, involved such a personal reliance upon the character and solvency of the vendees as made the contract one of a personal character, and not assignable. It is observable that even in this case the court suggested that, if instead of being an assignment to a stranger, there had simply been a change in a partnership by the coming in or withdrawal of a partner, the change might have been held to have been in contemplation of the parties; and the court also expressly distinguished the case from an agreement to sell and deliver goods at a fixed price, payable on delivery.

The defendant in error takes no issue with the principles laid down in the cases cited by the plaintiff in error on this point, but entirely acquiesces in them. There is nothing in the judgment of the court in this case which at all conflicts with them; and, in fact, the application of the principles established in these cases to the facts of the case in which the present appeal is taken, would be fatal to the contention of the plaintiff in error.

In the first place, it is to be observed that the written contract contains nothing to indicate that it involved anything of a personal character. It was a contract for the sale and delivery of goods. The vendors were to deliver certain goods

of a specified kind and quality at stipulated times. The vendee was to accept and pay for those goods. Neither party agreed to accept the judgment of the other; but, on the contrary, it was provided that in case of dispute as to the quality of the goods delivered, arbitrators should be selected. So far, therefore, as the terms of the contract are concerned, it was clearly one which did not fall within the exception mentioned in the cases cited by plaintiff in error.

The contract being in writing could not be varied by the oral testimony; but, assuming that the oral testimony of the defendant was admissible, it destroys instead of substantiating his contention. It appeared that he made the contract not with the partner who retired, but with one of the partners who remained in the firm. (Record, folio 98, printed page 55.) If he relied upon anybody, it appeared that he relied upon the partner from whom he bought, since he said of that partner at the time of the contract: "If you are as good as your brother, I will depend on you." (*Idem.*) It further appeared that this partner from whom he bought was the partner who, in all previous sales to him, had selected the hops, and who selected the hops shipped to him under this particular contract. In fact, he was the partner who bought all that kind of hops for the firm. (Record, folios 138, 139, printed pages 78, 79.) It further appeared that, in point of fact, the defendant did not rely upon the judgment of either partner, but it was his practice to call in an expert to examine the shipments of hops, and he rejected or approved them upon the judgment of that expert. (Record, folio 100, printed pages 55, 56.)

Even, therefore, if this had been a case of an assignment of the contract to a stranger, the defendant would have been liable under the doctrine of the cases whose authority he invokes.

The case, however, was not one of an assignment to a stranger, but was the ordinary case of the retirement of a partner from a firm, and the assignment of his interest in firm assets. In such a case the contracts of the firm are not abrogated, unless it clearly appears in some particular contract that it involved the personal services of the partner who re-

tired. All the partners, including the retiring partner, remain liable upon the contracts, and are bound to perform them. The mere fact that the firm is dissolved by the retirement of one partner, or that he assigns to the other his interest in the firm contracts, does not ordinarily relieve the parties contracting with the firm any more than it relieves the firm from performing its contracts with third persons. This is familiar law, and the plaintiff in error cites nothing contrary to it, except a paragraph from Parsons on Partnership, which, taken by itself, would seem to announce broadly the opposite doctrine. A reference, however, to the book from which it is taken will show that it is the concluding paragraph of a section which deals entirely with two classes of contracts, namely, contracts of guarantee, and contracts which have particular reference to the individual skill of the withdrawing partner. Read in connection with its context and the cases cited in the foot note, it will be seen that it was never intended to announce the broad doctrine in support of which it is now cited, but that it referred to the classes of cases then under discussion by the learned author.

The citation from Lindley on Partnership, immediately preceding it in plaintiff in error's brief, states undoubtedly the true doctrine, which is that a contract with a firm may be abrogated by dissolution, if it is of a purely personal character requiring the services of the party who withdraws.

It is not necessary to cite many authorities to support the proposition that ordinarily the dissolution of the firm by the withdrawal of a partner does not relieve parties from the obligation of contracts entered into with the firm. A few cases, however, may be referred to.

The exact point involved in this case was involved in the recent case, in the Court of Appeals of Kentucky, of

Campbellsville Lumber Co. *vs.* Bradlee, 96 Kentucky, 494, 29 S. W. Rep., 313.

In that case a corporation having a contract to sell certain lumber for cash to a firm, refused to deliver under the contract after the retirement of one member of the firm. The court held that this was not a good defense, saying:—

The main, indeed only, excuse pleaded by the defendant for refusal to carry out the contract, was the transfer by Bradlee of his interest in it to Wiggins without the consent of the defendant, whereby, as argued, it became unenforceable. It seems the transfer was made upon dissolution of the firm of Bradlee and Wiggins, the benefit of that contract falling to the latter in division of the assets. But as Bradlee did not, nor could not, in virtue of either the dissolution or transfer to Wiggins, release himself from the undertaking by the firm to pay the defendant for the lumber upon delivery, we do not see how the latter was affected, nor upon what principle it could be released from its undertaking. If it was, then the dissolution of a partnership would in all cases put an end to each mutual or reciprocal contract the firm may have entered into, however profitable or advantageous. But it does really no more take away the rights of individual members under such contracts than it releases him from obligations to perform.

It is true the written assignment did not have the effect to divest the firm of Bradlee and Wiggins of the legal title; but that does not prevent a recovery in this action, brought by the proper parties plaintiff.

To the same effect was the case of

Fish *vs.* Gates, 133 Mass., 441.

In that case a firm composed of two partners undertook to do certain specified work on fifty sets of table irons. Before much of the work was done the firm was dissolved, and the work was performed by a person under the supervision of one partner alone. The declaration was upon a contract performed by the firm, and for money due the firm. It was held that the dissolution was no defense, the court saying:—

The defendant made a special contract with the plaintiffs as copartners to do work for him. In any suit to enforce this contract, or any liability growing out of it, both partners must be joined as plaintiffs. The defendant contracted with them jointly, not with either of them separately. The dissolution of the partnership before the work was completed had no effect upon the rights or liability of the defendant.

To the same effect was

Holmes *vs.* Shands, 27 Miss., 40,

which was a suit in the name of a firm to recover for work, most of which had been done after dissolution, it was held that the firm could recover, the court saying:—

The contract was made with the firm during the existence of the partnership, and it was competent for the parties after dissolution to carry out a contract previously made and in part performed.

Second.—IS THE SECOND PROPOSITION OF THE PLAINTIFF IN ERROR CORRECT, VIZ: "THE PLAINTIFFS WERE NOT ENTITLED "TO SUE IN OCTOBER, 1896, FOR THE BREACH OF CONTRACTS "WHICH, BY THEIR TERMS, DID NOT MATURE UNTIL AFTER SUIT "BROUGHT."

This question is not necessarily involved in the present case. It appeared from the evidence of the defendant (Record, folios 97, 98, printed page 54) that there was really but one contract made between plaintiff and defendant for the delivery of hops during a period of five years, and that this contract had been partially performed by the delivery of three years' supplies of hops, and the tender and refusal of one instalment upon the next year's supply. For convenience, each year's delivery was embodied in a separate paper; but, in point of fact, there was but one contract, the defendant's testimony on this point being corroborated by the letters written by the defendant and his counsel repudiating the contract and printed on pages 10 and 12 of the Record. The obligation of the defendant to receive the hops is spoken of as a "contract," "for "the hops of the crop of 1896 and 1897," which necessarily included not only the obligation of the paper under which deliveries were then due and which included only hops of the crop of 1896, but the remaining papers. It is this entire contract for hops of the crop of 1896 and 1897 which is annulled. As the papers were but the evidence of the contract, not the contract itself, the separation of the deliveries into a number of papers would not prevent the contract from being a single one. It was thus treated by the court below, as appears by the opinion on the motion for a new trial on printed page 30 of the Record. If this is the case, the doctrine of

Hochster *vs.* De la Tour, 2 Ell. & Bl., 678,

is not involved, since it was the law long before that case was decided, and still continues to be the law, that where a vendee refuses to accept one delivery under circumstances which show intention to repudiate the entire contract, the vendor

may treat this refusal as a breach of the whole contract, and bring an immediate action for damages for his entire loss.

Cort *vs.* Ambergate Railway Co., 17 Q. B., 126 (1851).

The principle upon which this rests cannot be better stated than in the words of Mr. Justice Brewer, in the case of

Anvil Mining Co. *vs.* Humble, 153 U. S., 540–551.

> Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform. In other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.

If, therefore, this transaction is treated as one contract, as the defendant in error contends it should be treated, the question of the soundness of the doctrine of Hochster *vs.* De la Tour becomes unimportant, since the case then becomes the ordinary one of a defendant who repudiates a contract after it has been partially performed by the plaintiff.

Assuming, however, for the purposes of the argument, that these separate pieces of paper, which were intended as the evidence of the contract made on the twenty-fifth day of August, 1893, were separate and independent contracts, the question is raised whether, upon a distinct and unequivocal repudiation and refusal to carry out the contracts by the defendant, the plaintiff could accept the situation thus tendered, treat the contracts as abandoned and sue for the damages caused by the breach.

The question raised in

Dingley *vs.* Oler, 117 U. S., 490,

as to whether the refusal to perform was distinct and unequivocal, does not arise in this case, since the letters of the defendant and his counsel (printed page 12 of Record) contain the most absolute and distinct refusal to take not merely hops of the crop of 1896, which was all that the paper under which

delivery was then tendered referred to, but " hops of the crop " of 1896 and 1897," deliverable by plaintiff to defendant. And the previous letter of defendant, printed on page 10 of the Record and referred to in the letter on page 12, puts the matter beyond all doubt by mentioning the quantity of hops covered by the four papers in suit as the hops the obligation to take which the defendant repudiated. The sole question, therefore, is as to the effect of this repudiation.

It would seem somewhat late in the day to question the authority of the case of Hochster *vs.* De la Tour. That case has been uniformly followed in England.

Danube, &c., Co. *vs.* Kenos, 13 Com. Bench, N. S., 825;
Frost *vs.* Knight, L. R., 7 Exchqr., 111;
Roper *vs.* Johnson, L. R., 8 Com. Pleas, 167.

It has been accepted by the majority, if not all, of the text writers, and its doctrine is usually stated in the text books without qualification. With one exception it has been accepted and followed by every State court of last resort in which the question has been presented, and the great weight of authority in Federal courts, including a very recent decision of a Court of Appeals, is in its favor.

In Pennsylvania, the case first came before the courts in an action in the District Court of Philadelphia, the opinion being delivered by Judge Hare.

Mountjoy *vs.* Metzger, 12 Am. Law Reg., N. S., 442.

The discussion of the case by this eminent jurist is extremely interesting. In the course of his opinion, speaking of the repudiation of the contract, he says :—

It cannot be said that such a refusal is a mere declaration of intention as distinguished from an actual breach. It is no doubt true that the parties have the whole of the last twenty-four hours during which to perform the agreement. Hence a buyer to whom the goods are offered at noon, may require the vendor to keep them in readiness till night, to give him time to procure and pay the purchase money. But an unqualified refusal on his part is an irreparable breach which leaves no room for a

subsequent change of purpose. It is an implied authority to the vendor to dispose of the property to the best advantage, and charge the purchaser with the difference.

At the end of the opinion, in speaking of the doctrine in Hochster *vs.* De la Tour, he adds:—

The doctrine may, therefore, be regarded as established in England, and from its intrinsic reasonableness will in all probability prevail in the United States.

This prophecy has since been literally fulfilled. Since that time, the doctrine has been repeatedly approved by the Supreme Court of Pennsylvania.

Zuck *vs.* McClure, 98 Penna., 541;
Hocking *vs.* Hamilton, 158 Penna., 107.

The facts of this latter case were that the defendant agreed to buy from plaintiff fifty thousand tons of coal in monthly instalments of about four thousand tons per month, at a certain price per ton, the contract being a severable contract, under the doctrine of Scott *vs.* Kittanning Coal Co., 89 Penna., 231. After a portion of the coal had been delivered, the defendant repudiated the contract. He subsequently sent various orders to plaintiff for coal, which were filled and for some of which he paid. Plaintiff then brought suit for the amount due for the unpaid bills of coal, and also for the failure to accept the full amount of coal under the contract. The defendant defended on the ground that under the contract, if it was enforced, payment for the coal shipped under it would not be due until after the commencement of the suit. The court sustained the recovery, stating as the correct principle of law the following quotation from the American and English Encyclopedia of Law, vol. 3, page 904:—

If before the time for the performance of a contract has arrived, one party announce to the other that he does not intend to perform his promise, the latter may treat the contract as broken and bring an action immediately against the former for the breach. It is not necessary that he should postpone his suit until the time for performance has arrived.

In New York, the Court of Appeals in
Burtis *vs.* Thompson, 42 N. Y., 246,

cited Hochster *vs.* De la Tour, but said that they are not fully prepared to concur in the judgment of the case, without further consideration. Subsequently, however, in

Howard *vs.* Daly, 61 N. Y., 362,

the case was thoroughly discussed and approved by the judge who delivered the opinion, and in

Windmuller *vs.* Pope, 107 N. Y., 674,

it was expressly approved and followed by the court. It is now the settled law of that State.

The courts of Maryland have approved the doctrine of Hochster *vs.* De la Tour in the case of

Dugan *vs.* Anderson, 36 Md., 567.

Miller, J., delivering the opinion of the court, said:—

The defendant's first prayer denies the right of the plaintiff to recover damages for the alleged refusal of the defendant to take the plaintiff into partnership on the first day of March, 1871, under the contract alleged and sought to be set up, because the action was instituted prior to that time. The proposition thus announced by the defendant's prayer is a denial of the law of Hochster *vs.* De la Tour, 20 Eng. L. & Eq. Rep., 157, and of the English cases that have followed and sanctioned that decision. * * * The principle of this decision in cases to which it has been held applicable is, that there is a breach of the contract when the pomissor repudiates it and declares he will no longer be bound by it. It is said the promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages, the repudiation of the contract by the other party, and the announcement that it never will be fufilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it, the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly. The contract having thus been broken by the promissor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause for action, and damages be assessed and recovered in respect of it, though the time for the performance

may yet be remote. It is obvious that such a course must tend to the convenience of both parties, and though decisions ought not to be founded on grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promissor, the promisee may in many cases avert, or at all events, materially lessen the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or wo uld have been diminished.

In the case of

Hosmer *vs.* Wilson, 7 Mich., 294,

the Supreme Court of Michigan, Christiancy, J., delivering the opinion, said:—

But it was claimed by plaintiff's counsel that no action could have been maintained on the special contract until fully performed, and the engine delivered or tendered to the defendants; that the unqualified refusal of the defendants to take the engine when it should be completed was not a prevention of performance which would authorize the plaintiff to sue upon the contract on that ground. We think it was, and that such absolute refusal is to be considered in the same light as respects the plaintiff's remedy as an absolute physical prevention by the defendants. This view will be found fully sustained by the following cases: Cort *vs.* Ambergate Railway Company, 6 E. L. & Eq., 230; Derby *vs.* Johnson, 21 Vt., 21; Clark *vs.* Marsiglin, 1 Denio, 317; Hochster *vs.* De la Tour, 20 L. & Eq., 157.

In the case of

Crabtree *vs.* Messersmith, 19 Iowa, 179,

the Supreme Court of Iowa, Cole, J., delivering the opinion, said:—

The action was commenced on the twenty-third day of December, 1861. There was evidence introduced tending to show that by the terms of the original contract of sale the defendant had his option to pay for the machine in money or in grain, as he earned it with the machine, at any time by or before Christmas, 1861. The evidence also tended to show that the defendant had taken the machine back to plaintiffs and expressly renounced the contract of purchase under which he had taken possession of it, and left the State and did not return until after Christmas, 1861. The fourth instruction asked by the plaintiffs and given by the court was, in substance, that if the jury believed from the evidence that before this suit was commenced the defendant had declared that he would not retain or pay for the machine, and left the State without making provision

for the payment, and did not return till after the time fixed for payment, that such acts were evidence tending to show an abandonment of the contract which would entitle the plaintiff to bring this suit before the expiration of the time fixed for the delivery of the grain. The defendant claiming that the suit was prematurely brought, relied thereon in the District Court as a defense to the action, and asked the court, in several instructions prepared by his counsel, which were refused, and which embraced the same idea in different phraseology, to instruct the jury that if this suit was commenced before the time had expired in which the defendant was to deliver the grain, then the plaintiff could not recover. The giving and refusing to give these respective instructions was not error. The rule of law is well settled, that if before the time of performing the contract arrives the promisor expressly renounce the contract, the promisee may treat this as a breach of said contract, and may at once maintain an action in respect thereof. Chitty on Contr., 799; Hochster *vs.* De la Tour, 2 Ellis & B., 678; Avery *vs.* Bowden, 5 *Id.*, 714; Elderton *vs.* Emmons, 6 Com. B., 160; Bowdell *vs.* Parsons, 10 East., 359; Lamoreaux *vs.* Rolfe, 36 N. H., 33.

Followed in

McCormick *vs.* Basal, 46 Iowa, 235.

In the case of

Fox *vs.* Kitton, 19 Ill., 518,

the Supreme Court of Illinois, Breese, J., delivering the opinion, said:—

We are disposed to attach more importance under the circumstances of this case to the conduct and declarations of the defendant at Chicago than his counsel seem to do, and are disposed to regard them as affording good grounds for prompt action on the part of the plaintiff, and as conferring the right upon him of avoiding the contract altogether. The defendant had agreed for the season ensuing the nineteenth day of May to run the vessel in the Buffalo and Chicago trade, and pay over the net earnings as fast as earned to the plaintiff. His undertaking, it seems to us, is of that description, and falls under that class of cases to which we have been referred, where a party agreeing to do an act at a future day, and before that day arrives declares he will not keep his contract or do the act, that the other party may act on the declaration and bring the action before the day arrives. * * * We think the declarations of the defendant and his refusal at Chicago to accept the services of plaintiff's agent to procure a cargo for Buffalo, gave the plaintiff a right to consider the new contract as repudiated, and justified him in taking possession.

Followed in

Follansbee *vs.* Adams, 86 Ill., 13.

In the case of

Kurtz *vs.* Frank, 76 Ind., 594,

the Supreme Court of Indiana, Woods, J., delivering the opinion, said:—

* * * But if this were otherwise, and if by its terms the contract was not to have been performed until at a time subsequent to the commencement of the suit, yet if, before the suit was brought, the appellant had renounced the contract and declared his purpose not to keep it, that constituted a breach for which the appellee had an immediate right of action. Burtis *vs.* Thompson, 42 N. Y., 246; Holloway *vs.* Griffith, 32 Iowa, 409; Frost *vs.* Knight, L. R., 7 Exch., 111.

In the case of

Davis *vs.* Grand Rapids School Furniture Co., 24 S. E., 630,

the Supreme Court of West Virginia, Holt, J., delivering the opinion, said:—

Instruction No. 4 was in effect that if the contract was binding, then the defendant had until the fifteenth day of August, 1893, in which to comply with the same, and no right of action could accrue to the plaintiff until the time which defendant had in which to comply had fully expired. This was properly refused, for the defendant had notified plaintiff that they did not intend to comply at all, and plaintiff had a right to take them at their word and sue for whatever damage the plaintiff thereby sustained.

In the case of

Remy *vs.* Olds, 88 Cal., 537,

the Supreme Court of California, Fitzgerald, J., delivering the opinion, said:—

The complaint shows upon its face that the action was brought subsequent to the written notice of the repudiation of the contract by the defendants, when the plaintiff was not in default, and after he had removed from and vacated, and the defendants had entered upon and taken possession of, the premises heretofore mentioned. This constituted such a breach as authorized the plaintiff to immediately sue, without waiting for the time to arrive for the performance of the other conditions.

In the Federal Courts the question first came up in

Hancock *vs.* The N. Y. Life Ins. Co., 13 Am. Law Reg., N. S., 103 (11 Fed. Cases, 402).

This was a suit against a life insurance company, which,

during the life of the person insured, repudiated the contract. The case was tried in the Circuit Court for the Eastern District of Virginia, before Bond, C. J. The plaintiff's counsel contended that under the doctrine of Hochster *vs.* De la Tour, the plaintiff was entitled to a recovery. The court sustained this ruling, and a verdict was rendered for the plaintiff.

The next case was the case of

Grau *vs.* McVicker, 8 Biss., 13 (10 Fed. Cases, 996).

In that case Drummond, C. J., said:—

I think that the principles decided in the case of Hochster *vs.* De La Tour, reported in 20 Eng. Law & Eq., 157, are sound. That was a case where two parties made an agreement with each other by which one was to enter the employment of the other and to perform a contract which was to commence on a day named. The plaintiff in the action agreed to be a courier of the defendant on the continent of Europe for a time, commencing on the 1st of June. Before that time arrived the defendant had notified the plaintiff that he would not perform the contract; in other words, that he did not want him as a courier. Thereupon, before the 1st of June, the plaintiff commenced an action against the defendant and recovered, and the question came up before the Court of Queen's Bench whether the action under such circumstances, could be maintained. And the unanimous opinion of the court was that the action was maintainable, and on the ground that although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September as that the action could not be maintained for a breach prior to the 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case and in this the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make, whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action

against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages.

The next case was the case of

Dingley *vs.* Oler, 11 Fed. Reps., 372,

in which the question came before the Circuit Court for the District of Maine. The opinion of the court, approving and applying the doctrine of Hochster *vs.* De la Tour, was delivered by Lowell, C. J. In the course of that opinion he says :—

The defendants having unqualifiedly refused to ship the ice, this action may be maintained, though brought before the close of the season, if the doctrine of Hochster *vs.* De la Tour, 2 Ell. & Bl., 678, is to be followed. That doctrine is that in contracts for services, for marriage, for deliveries of merchandise, if the principal, before the time for performance arrives, renounces the contract, an immediate action will lie. Frost *vs.* Knight, L. R., 7 Ex. 111.; Roper *vs.* Johnson, L. R., 8 C. P., 167; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; Fox *vs.* Kitton, 19 Ill., 519; Burtis *vs.* Thompson, 42 N. Y., 246; Howard *vs.* Daley, 61 N. Y., 362. These cases seem to me to be founded in good sense and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.

The judgment in this case was reversed in

Dingley *vs.* Oler, 117 U. S., 490,

but upon other ground, the Supreme Court declining to express an opinion as to the doctrine of Hochester *vs.* De la Tour.

In the case of

Foss Schneider Brewing Co. *vs.* Bullock, 59 Fed Rep., 83 (16 U. S. Appeals, 311),

Taft, C. J., in delivering the opinion of the Circuit Court of Appeals, said :—

It is true that where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other contracting party may accept this as an anticipatory breach of the contract and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms, but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such and consider the contract at an end.

In the case of

Edward Hines Lumber Co. *vs.* Alley, 73 Fed. Rep., 603 (43 U. S. Appeals, 169),

the Court of Appeals for the Sixth Circuit recognized the doctrine of Hochster *vs.* De la Tour as in force. In that case there was a contract to manufacture and sell lumber, and to pay for it in installments within sixty days after portions of it were piled. The suit was brought within less than sixty days after the piling of the whole lumber, and the question was whether there had been a repudiation of the contract by the defendant prior to the time for performance. The Court of Appeals held that the Circuit Court properly instructed the jury:—

> That as a matter of law, the plaintiff in error by its letter of September 1st had renounced the contract and had refused performance absolutely and unconditionally, and had therefore breached their agreement to receive not only the installment it was asked to receive at the time, but had committed a breach of the entire contract.

In the very recent case of

Marks *vs.* Van Eeghen, 85 Fed. Rep., 853 (57 U. S. Appeals, 149),

decided by the Circuit Court of Appeals for the Second Circuit, March 2d, 1898, the exact point came before the court. Wallace, C. J., delivering the opinion, said:—

> It was decided in Daniels *vs.* Newton, 114 Mass., 530, that the action does not lie before the expiration of the time of performance, and recently that case was followed in Clark *vs.* Casualty Co., 67 Fed., 222. The question has never been decided by the Supreme Court of the United States, and the observations in the opinions in Smoot's Case, 15 Wall., 36, and Dingley *vs.* Oler, 117 U. S., 490, 6 Sup. Ct., 850, were *obiter*. In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated, his right of action accrued at once. The latter, however, must elect whether he will treat the contract as terminated, or as still existing; and if he does not do so, his right of action for a breach can only rest upon the refusal of the other party to perform the existing contract according to its terms. The action cannot be maintained when the evidence to prove a renunciation of

the contract is equivocal or indeterminate. It is enough, however, if it appears that he has distinctly signified his intention to repudiate the contract. The English authorities in support of these propositions, beginning with the leading cases of Hochster *vs.* De la Tour, 2 El. & Bl., 678, are unanimous. Frost *vs.* Knight, L. R., 7 Exch., 111; Roper *vs.* Johnson, L. R., 8 C. P., 167; Johnstone *vs.* Milling, 16 Q. B. Div., 460. The doctrine of these authorities has been adopted and approved by the courts of this country in numerous adjudications. Brewing Co. *vs.* Bullock, 8 C. C. A., 14, 59 Fed., 83; Howard *vs.* Daly, 61 N. Y., 362; Ferris *vs.* Spooner, 102 N. Y., 10, 5 N. E., 773; Windmuller *vs.* Pope, 107 N. Y., 674, 14 N. E., 436; Nichols *vs.* Steel Co., 137 N. Y., 471, 33 N. E., 561; Fox *vs.* Kitton, 19 Ill., 519; Engesette *vs.* McGilvray, 63 Ill. App., 461; Railway Co. *vs.* Richards, 152 Ill., 59, 38 N. E., 773; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; McCormick, *vs.* Basal, 46 Iowa, 235; Platt *vs.* Brand, 26 Mich., 173; Sloss Co. *vs.* Smith, 11 Ohio, 312; Kalkhoff *vs.* Nelson, 60 Minn., 284-287, 62 N. W., 332; Davis *vs.* Furniture Co., 41 W. Va., 717, 24 S. E., 630.

In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated was signified by the prompt commencement of their action.

Against this current of authority there are but two cases, viz.,

Daniels *vs.* Newton, 114 Mass.; and

Clark *vs.* National, &c., Co., 67 Fed. Rep., 222.

With regard to the first of these cases, it may be observed that it is not only in conflict with all the other authorities in the State courts, but is inconsistent both with the earlier and later decisions of the Supreme Court of Massachusetts.

In the earlier case of

Collins *vs.* Delaporte, 115 Mass., 159,

the Supreme Court of Massachusetts approved the principle of

Cort *vs.* Ambergate Railway Co., 17 Q. B., 127,

which they cite, and say that upon the defendant's refusal to carry out an executory contract, the plaintiff might treat the contract as then broken. And in a case later than Daniels *vs.* Newton, viz.,

Whitten *vs.* New England, &c., Ins. Co., 165 Mass., 343,

the court allowed an action to be brought on a policy of in-

surance which promised to pay within sixty days after the approval of the claim, upon proof that although the sixty days had not expired, the insurance company had denied all liability. It is true that in this later case the court attempt to distinguish Daniels *vs.* Newton, but the distinction is not very obvious, since in both cases the time for performance had not arrived when suit was brought.

With regard to the Federal case of

Clark *vs.* National, &c., Co., 67 Fed. Rep., 222,

it was a decision of a District Court, and is entirely contrary to the overwhelming weight of Federal authority.

So great is the weight of authority in favor of Hochster *vs.* De la Tour that it may be now regarded as an established rule of commercial law in this country as well as in England, and the defendants in error might well rest their case upon this alone.

If, however, the question was one to be considered *de novo*, without the light of authority, it would be clear that in the administration of mercantile law the doctrine announced in Hochster *vs.* De la Tour is the one which should be adopted by the courts. This doctrine is not, as the counsel for plaintiff in error contends, a novel departure from the common law. On the contrary, it is simply a development of the principles of that law.

It is well settled that if an executory contract is to be performed in installments, a breach of one installment of the contract will, under certain circumstances, entitle the other party to treat such breach as a breach of the entire contract, and to bring a suit at once for the damages sustained by the entire breach, although the time for the performance of the other installments may not yet have arrived. This rests upon the principle stated by Mr. Justice Brewer, and already quoted in this brief, that whenever one party to an executory contract is guilty of such a breach as indicates his intention to repudiate the contract, the other party may accept the situation which the wrongdoer has brought about and recover all his dam-

ages which he suffers through breach of the entire contract. Indeed, any other doctrine would be an absurdity. If A. orders from B. goods to be delivered in installments over a period of several months, and A. upon delivery of the first lot of goods not only declines to receive them, but repudiates the contract, it would seem strange indeed if B. could not accept the situation thus tendered, cancel his arrangements for obtaining the goods and bring suit for his damages. As was pithily said by Lord Campbell, in Cort *vs.* Ambergate Railway Co., 17 Q. B., 127–139, "If it were law, it could not be sense."

This being undoubtedly the law with regard to executory contracts repudiated in the course of performance, what logical difference can there be with regard to executory contracts repudiated prior to the commencement of performance? In both cases the action is brought before the time for complete performance, and may be brought for damages for a breach of a contract prior to the time when the plaintiff was entitled to complete performance. In both cases the same difficulties exist in the way of measuring damages. All that can be urged against the one doctrine can be urged against the other. The analogy of commercial paper, which was suggested by the learned judge who delivered the opinion in Daniels *vs.* Newton, and which is strenuously insisted upon by the counsel for plaintiff in error in his brief, presents no real difficulty. Simple contracts for the payment of money are somewhat different from executory contracts for the purchase of goods, and this difference is constantly recognized in the application of legal principles. Contracts for the payment of money are not wholly executory contracts, but are executed on one side, the consideration having passed, and are executory only so far as the party who signs the promissory note or bond is concerned. It is well settled that in an executory contract for the delivery of goods in installments, a breach of one installment under circumstances which indicate a repudiation of a contract, will entitle the other party to the contract to consider the contract as broken and sue for damages for its entire breach; but the same rule would not apply to a bond for the

payment of money in instal'ments, where the default in the payment of one installment would only give an action for the recovery of that installment, unless there was an express provision in the bond that the whole should become due if one installment were in default. This distinction between contracts for the payment of money and contracts for the delivery of goods has always been recognized in the case of a breach during performance, and there would seem to be no difficulty in recognizing it in the case of a breach before performance has commenced.

It is submitted that on principle alone, irrespective of any authority, the doctrine of Hochster *vs.* De la Tour is sound, and the fact that it is met with the approval of such an array of courts is in itself very conclusive evidence of this.

Third.—IS THE THIRD PROPOSITION OF THE PLAINTIFF IN ERROR CORRECT, VIZ.: "THAT THE MEASURE OF DAMAGE "WAS NOT THE DIFFERENCE BETWEEN THE PRICE AT WHICH "FORWARD CONTRACTS COULD HAVE BEEN OBTAINED AT A "DATE LONG PRIOR TO THE TIME OF DELIVERY AND THE "CONTRACT PRICE, BUT THE DIFFERENCE BETWEN THE MAR-"KET AND CONTRACT PRICE AT THE TIME WHEN DELIVERY "SHOULD HAVE BEEN MADE AND ACCEPTED."

It will be observed that this point really depends upon the plaintiff in error's second proposition. If, either in the case of an executory contract repudiated during performance, or an executory contract repudiated prior to any performance, suit can only be commenced after the expiration of the time for complete performance, then the measure of damages is the difference between the contract price and the market price at the date of delivery. If, however, in either case suit may be brought before the time for complete performance, then the plaintiff in error's proposition is not correct if its meaning is that the court must wait until the date of complete performance before estimating the damages. If a suit may be commenced before the time for complete performance, it may, of course, be tried before that time, and in such cases it would be impossible to obtain in advance market quotations for a future date. The rule in such cases is to give to the plaintiff compensation

based as far as possible upon the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.

In the ordinary contract for the sale of goods not specific, the loss is the profit which the seller would have made. This is usually measured by the difference between the contract price and the market value at the date of delivery, because:—

First.—If the vendor did not purchase the goods until the date of delivery, his profit would be the difference between the contract price and the market price at that date.

Second.—If the vendor purchased the goods prior to the date of delivery, he could sell them at the date of delivery for the market price, and hence his profit remains the same.

The rule as to market price, however, is not an arbitrary rule, but only applies in such cases because it is necessarily the best measure of the plaintiff's loss. Where, however, before the entire completion of the contract the vendee repudiates it, it is necessary to ascertain the damage in other ways. If the vendor was to manufacture the goods, and in the process of manufacture the contract is repudiated, he is not bound to complete the manufacture and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance.

Hinckley *vs.* Pittsburgh, &c., Co., 121 U. S., 264;
Gallagher *vs.* Whitney, 147 Penna., 184.

It is, of course, obvious that in such cases the manufacturer may actually obtain his profit before the time fixed for performance, and may recover on a basis of cost which might have been increased or diminished by subsequent events, but the party who broke the contract before the time for complete performance cannot complain, and takes the risk of loss or profit by such anticipation of the time.

If the vendor has to buy instead of to manufacture, the same principle prevails. He need not keep the goods on hand, or subsequently buy goods to fill the contract. He

can show what was the value of the contract by showing for what price he could have made subcontracts, this price corresponding to the cost of manufacture in the case of a manufacturer. He too may receive his money earlier in this way and may gain or lose by the estimation of his damage in advance of the time for performance, but, as was said by Mr. Justice Brewer, he has the right to accept the situation tendered to him, and the other party cannot complain.

The case of

Roper *vs.* Johnson, L. Reps., 8 C. P., 167,

cited by plaintiff in error, is not inconsistent with this. In that case it was held that the plaintiff was not precluded from recovering damages because he did not or could not show that he could have made a forward subcontract. Grove, J., says:—

> If there had been any materials here to show that at the time of the breach the plaintiffs could, without extraordinary trouble, have entered into a forward contract at the then market price, the jury might have taken them into consideration in mitigation of the damages.

The principle adopted by the court below was applied and elucidated by Mr. Justice Peckham in delivering the opinion of the Court of Appeals of New York in the case of

Nichols *vs.* The Scranton Steel Company, 137 N. Y., 471–487:—.

> We hold, however, that by the repudiation the plaintiff is absolved from the further delivery of iron under the contract, and that an action to recover damages arising from defendant's refusal to receive and pay for such iron may be at once commenced. We do not think the fact that some iron had been delivered, the time for the payment of which had not, by the terms of the contract, arrived when the suit was commenced, makes any difference.
>
> If it were not for a repudiation of the contract, nothing could be recovered as damages for the iron not delivered, because by the terms of the contract such delivery and payment would not be due; but when the defendant does repudiate the contract and refuse on its part to fulfill its terms, it cannot be heard to say that the other party must himself be bound by it, and must await the expiration of the term of credit provided for by it before any action can be maintained under it. The plaintiff does not recover the moneys as being the contract price strictly and technically, but as damages for the breach of the contract by the defendant. And those damages would be the present worth of the moneys payable under the contract at the time therein provided. Thus, if the moneys

were to be due at the end of four months from the time when the iron was, by the terms of the contract, to be delivered, the measure of damages would be, in such case, the present worth of an obligation to pay money due at such a certain time.

It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal.

With regard to the suggestion of the plaintiff in error that there was no sufficient evidence to be submitted to a jury that forward contracts could have been secured, the complete answer is that such a question is not raised by the assignments of error. Evidence on this point was offered and admitted, and no question relating thereto is involved in the present appeal. The evidence, it is submitted, was ample; but whether it was or not, the point is not raised by the assignments.

Fourth.—IS THE FOURTH PROPOSITION OF PLAINTIFF IN ERROR CORRECT, VIZ., "THE CONTRACTS WERE INDEPENDENT, "AND THE REFUSAL TO ACCEPT TENDER UNDER THE FIRST "GAVE NO CAUSE OF ACTION UNDER THE OTHER THREE"?

This is a new point, first appearing in the brief on appeal. It rests entirely upon a misunderstanding of the facts. It has already been argued that the contracts were not independent, but were really parts of one contract; but even if this were not so, the repudiation by the defendant was not of one of the contracts, but of all of them. It needs only a reference to the letters of the defendant and his counsel (on printed page 12 of the Record) to see that what was repudiated was not only the defendant's obligation under one of the papers,

but was a repudiation of his liability under all of them. True, he alludes to them as a "contract" of August 25th, 1893, this being in accordance with his understanding that the papers constituted but one contract; but he speaks of considering his contract at an end, and of his making arrangements for purchasing supplies elsewhere, and he refers to and confirms his previous letter of June 27th, 1896 (printed page 10 of the Record), which specifically refers to the contracts for furnishing all the hops both of the crop of '96 and of the crop of '97, and says that he considers those contracts as annulled. The point is put beyond all question, however, by the letter of his counsel (printed on page 12 of the Record), in which he refers to the contract as a contract to "furnish hops of the crop of '96 and '97," which covered not merely the paper under which the shipment then tendered was sent, but all the four papers remaining of those executed on August 25th, 1893. These four papers covered two years' supplies, viz., two hundred bales of the crop of 1896 and two hundred bales of the crop of 1897. It is manifest upon reading all these letters that all of the papers signed on Auguat 25th, 1893, whether constituting one contract or four contracts, were repudiated by the defendant, and that there was a distinct and unqualified refusal to perform any of them. With regard to this proposition of the plaintiff in error, therefore, it is clear:—

First.—That if the papers are regarded as but parts of one contract, a breach of that contract had actually occurred after the time for the commencement of performance, and suit was properly brought.

Second.—If the papers are considered as separate contracts, there was a distinct and unqualified refusal to perform them all, and if the doctrine of Hochster *vs.* De la Tour is sound, the suit was properly brought.

For the reasons above given, it is submitted, the judgment of the court below should be affirmed.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Defendants in Error.

No. 188.

No. 188. October Term, 1899.

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JAMES H. McKENNEY,
Clerk.

Brief of Prichard & Garver

IN THE

Supreme Court of the United States.

Filed Jan. 29, 1900.

John Roehm, Plaintiff in Error,

vs.

Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

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FRANK P. PRICHARD,
JOHN A. GARVER,
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IN THE SUPREME COURT OF THE UNITED STATES.

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CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Plaintiffs below were hop growers and dealers and defendant was a brewer. In August, 1893, they made an arrangement by which plaintiffs below were to sell and deliver and defendant below was to buy and receive hops in certain specified quantities and at certain specified prices during ten seasons of five months each (two seasons in each year), the whole arrangement covering a period of five years. In pursuance of this arrangement they executed ten separate papers of even date, each called a "hop contract" and each cover-

ing the shipment of hops for a season of five months. Except for the times of delivery the contracts were identical. Both parties proceeded to carry out the arrangement, and after hops had been shipped for three years and paid for, the defendant unequivocally and positively declined to further carry out the arrangement or to receive any of the hops covered by the four remaining "hop contracts." Plaintiffs below thereupon tendered one shipment, which was refused, this refusal being accompanied with a letter declining to take any of the hops of the crop of 1896 and 1897 (the hops covered by the remaining four "hop con- "tracts"), and stating that defendant had made arrangements to purchase his stock from other parties. Plaintiffs thereupon brought the present action at law upon all four "hop contracts." This action was brought after the date fixed for the first delivery under the first of the four "hop "contracts" and after such delivery had been tendered, but before the dates fixed for the first deliveries under the other three "hop contracts," which extended over a period of two years. Plaintiffs recovered a judgment, and the question sought to be raised by this appeal is whether the action was premature as to three of the "hop con- "tracts."

BRIEF OF ARGUMENT.

In the court below two defenses were set up to the action.

One was that the retirement of one partner from the seller firm and the assignment of his interest to his copartners put an end to the contract, and justified the buyer in rescinding it.

The other was that the absolute refusal of the buyer to carry out the contracts gave no rights of action prior to the respective times fixed for performance, and therefore that as the contracts were for successive periods and as prior to the suit the time for delivery had only arrived in the case of one of them, the action must fall as to the other three.

The first defense seems to be abandoned in this court, and is not argued.

The second defense raises the question decided in England by the case of Hochster *vs.* De la Tour, 2 El. & Bl., 678, in which it was held that an absolute refusal to carry out a contract might give an immediate right of action, although the time for performance had not arrived. This is the principal question argued in the brief of plaintiff in error.

Before discussing this question, it is proper to call the attention of the court to the fact that it is not necessarily involved in the present case. While it is true that the contract between the parties was evidenced by ten separate papers, each called a "hop contract," it is equally clear from the evidence that there really was but one contract made for the delivery of hops in certain installments for five years, and that the execution of the ten separate pieces of paper called "hop contracts" was simply a means of conveniently evidencing this arrangement. The parties in their testimony and correspondence sometimes alluded to these papers as contracts, and sometimes to them as "a five years' contract," according to whether they were thinking of the separate pieces of paper or of the one arrangement.

In the first letter of the defendant, dated June 27th, 1896 (Record, page 29, folio 35), he speaks of the "con-"tracts," but in the final letter of repudiation of October 24th, 1896, written by defendant's counsel (Record, page 33, folio 39), it is stated that "he regards your *contract* "with him to furnish hops of the crop of 1896 and 1897 "annulled." In defendant's testimony (Record, page 45, folio 54), the defendant speaks of the ten pieces of paper as a "five years' contract," and later (Record, page 46, folio 55), he states "that's the reason I signed the con-"tract."

Similarly, the plaintiffs in their correspondence and letters sometimes allude to the transaction as "a contract," and sometimes as "contracts."

The circuit judge before whom the case was tried without a jury, in his opinion on the motion for a new trial (Record, page 25, folio 30), speaks of—

> The several contracts which were treated by the court, and correctly, I think, as constituting a single one;

and the Circuit Court of Appeals, in its opinion (Record, page 92, folio 110), says:—

> In August, 1893, Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, trading as Horst Brothers, entered into a *contract* with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific Coast hops, to be delivered at various dates in the future, at a uniform price of twenty-two cents per pound. Of the whole quantity, six hundred bales had been delivered, accepted and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. * * * The record shows that this contract was the result of one negotiation and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months, or one season. They all bear the same date; are similar as regards the quantity of hops to be delivered and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made.

There can be no doubt from the record that as the result of one negotiation the plaintiffs and defendant entered into one arrangement for the furnishing of one thousand bales of hops, and that the contract was broken by the defendant after six hundred bales had been delivered and paid for. If this is so, the case is not one of a breach of a contract before the time for the commencement of performance, but the case of a breach of a contract while in course of performance. In such case there is no conflict of authority, and it is well settled by the decisions of this court, that if the breach is such as to show a renunciation of the entire contract, the other party may accept the situation and bring suit at once for his entire damages, even though the time for the performance of the remainder of the contract has not arrived.

Lovell *vs.* Insurance Co., 111 U. S., 264;
Anvil *vs.* Humble, 153 U. S., 540;
Pierce *vs.* Tennessee Coal, &c., Co., 173 U. S., 1.

Assuming, however, that the transaction of August 25th, 1893, is to be treated not as one transaction, but as a series of ten wholly independent contracts, bearing no relation to each other and not dependent upon or in consideration of each other, then the doctrine of Hochster *vs.* De la Tour is directly involved in this case. Three years' supply of hops had been furnished, and six of the so-called hop contracts had been filled. Four remained unfulfilled. A shipment made under the first of the four was tendered and refused, and this refusal was accompanied by a declaration that the defendant considered the contract for all the remaining hops, viz., the crops of the years 1896 and 1897, annulled, and would refuse to carry out the arrangement. If the doctrine of Hochster *vs.* De la Tour is not good law, plaintiffs would be obliged to bring four suits, one on each of the so-called hop contracts. In the present suit he could recover only on the "hop contract" for the deliveries in October, November and December, 1896, and January and February, 1897, under which the shipment for October was tendered. For any relief on the other contracts, he would be obliged to wait until the time came for the first month's delivery.

Whether the doctrine of Hochster *vs.* De la Tour is sound law has never been decided by this court. It is alluded to as an open question in the cases of—

Dingley *vs.* Oler, 117 U. S., 490-503;
Pierce *vs.* Tennessee Coal, &c., Co., 173 U. S., 1-2.

The present case contains the element missing in Dingley *vs.* Oler, of a distinct unequivocal and absolute refusal to perform. The four contracts covered the crops of two years, viz., the crops of 1896 and 1897. The first letter of defendant, dated June 27th, 1896 (Record, page 29, folio 35) stated:—

I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm for the furnishing to me of two hundred bales of prime Pacific Coast hops of the crop of 1896, and two hundred bales of prime Pacific Coast hops of the crop of 1897, which,

of course, you cannot fulfill. I therefore consider the contracts as annulled, and will make other arrangements for the purchase of the hops that I may need.

And in the letter of defendant's counsel of October 24th, 1896 (Record, page 33, folio 39), which constituted the final breach, and which was written at the close of the correspondence, and after a formal tender of a shipment of hops had been made, it was said:—

I am instructed by my client, Mr. John Roehm, of this city, to notify you in confirmation of his communication of June 27th, that for reasons therein stated he regards your contract with him to furnish hops of the crop of 1896 and 1897 annulled, and that he has made arrangements to purchase his stock from other parties.

It will thus be seen that there was an absolute refusal persisted in after remonstrance and accompanied by a declaration that defendant had made arrangements to purchase his stock elsewhere.*

The question whether the doctrine of Hochster *vs.* De la Tour, viz., the doctrine that there may be an anticipatory breach of a contract by an absolute refusal to perform it, should be adopted by this court will be discussed under three propositions, as follows:—

***First.*—The decision in Hochster *vs.* De la Tour is not inconsistent with the principles and precedents of the common law, and is inherently reasonable.**

***Second.*—It has become the settled law of England as applied to executory contracts for the manufacture or sale of goods, and has been almost universally accepted by the courts of the United States.**

***Third.*—The Supreme Court of the United States, while it has never passed upon the question, has repeatedly adopted and applied the principles upon which the ruling of Hochster *vs.* De la Tour is founded.**

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* The correspondence subsequent to the suit referred to on page 33, folio 40, of the Record, related to a suggestion of compromise, and did not involve any waiver of the breach which had been acted upon by bringing suit.

These propositions will be considered separately.

FIRST.—THE DECISION IN HOCHSTER vs. DE LA TOUR IS NOT INCONSISTENT WITH THE PRINCIPLES OR PRECEDENTS OF THE COMMON LAW, AND IS INHERENTLY REASONABLE.

The case of Hochster *vs.* De la Tour was decided by the Court of Queen's Bench in 1853, and is reported in 2 El. & Bl., 678 (75 E. C. L.). The plaintiff was a courier, who, on April 12th, 1852, had entered into an agreement with defendant to serve him as a courier for three months from June 1st, 1852. On May 11th, 1852, the defendant wrote to plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. On May 22d, the plaintiff brought an action at law against defendant for breach of contract, and the question involved was whether the positive refusal of the defendant to carry out the contract was an immediate breach which entitled plaintiff to bring his action before the time fixed for the commencement of performance. The court held that there had been a breach of contract which entitled the plaintiff to sue, and entered judgment upon a verdict for plaintiff.

It has been sometimes loosely stated that this decision introduced into the common law of England the principle that there could be a breach of a contract before the time fixed for the commencement of its performance, and, in fact, most of the objections that have been urged against the soundness of this decision have been based upon this assumption.

Chief Baron Kelly, whose opinion in the court below in the subsequent case of

Frost *vs.* Knight (L. R., 5 Ex., 322, and L. R., 7 Ex., 111),

is the most elaborate English dissent from the doctrine, says in his opinion in that case:—

> But to say that the contract is broken is simply to utter an untruth. One contracts in 1870 to pay to another £100 on the 1st of January, 1871.

To say that the contract is broken before the year 1870 is at an end is undeniably and self-evidently untrue. It seems equally clear and uncontrovertible in fact, that a promise by a man to marry a woman after his father's death is not and cannot be broken while his father is yet alive.

And Mr. Justice Wells, of the Supreme Court of Massachusetts, whose opinion in

Daniels *vs.* Newton, 114 Mass., 530,

is the leading American dissent, says:—

An executory contract ordinarily confers no title or interest in the subject matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action.

This, however, was not the real issue raised by the case of Hochster *vs.* De la Tour. It has always been a principle of the common law, both before and since Hochster *vs.* De la Tour, that there could be a breach of a contract before the time arrived for the commencement of its performance. It has, for instance, always been the law that if one party to a contract destroyed the subject matter of the contract, or disabled himself so as to make the performance of the contract impossible, the act of destruction or the creation of the disability was in itself a breach of the contract, and gave rise not to a special action for damages, but to an action on the contract in which the antecedent destruction or disability was treated as a breach. This principle of the common law is very clearly stated by Sir Frederick Pollock in

Pollock's Principles of Contract, 6th ed., 410,

as follows:—

We now come to the case of a contract becoming impossible of performance by the default of either party.

Where the promisor disables himself by his own default from performing his promise, not only is he not excused (for which, indeed, authority would be superfluous), but his conduct is equivalent to a breach of the contract, although the time for performance may not have arrived, and even though in contingent circumstances it may again become possible to perform it.

He cites in a foot note, as illustrative of this, the following:—

1 Rolle's Abr. 448 B., citing 21 E. IV., 54 pl. 26: "If you are bound to "enfeoff one of the manor of D. before such a feast, and you make a "feoffment of that manor to another before the feast, you have forfeited "the bond, notwithstanding that you have the land back before the feast, "having once disabled yourself from making the said feoffment," per Choke, J.

The principle, therefore, that there may be a breach of the contract prior to the date fixed for the commencement of its performance did not originate with Hochster *vs.* De la Tour. What was novel with that case was the question whether an absolute and unequivocal renunciation of the contract by one party was equivalent to an act which rendered the contract impossible of performance, such as the destruction of the subject matter or the creation of a disability. The question was not whether the court should step aside from the path of prior decisions, but whether it should make a step forward in that path. Any discussion of the doctrine of Hochster *vs.* De la Tour which overlooks the important fact that it was, and always had been, a principle of the common law that there could be a breach of contract giving a legal right to damages before the time fixed for the commencement of performance of the contract, will only lead to a misunderstanding of the scope of that decision and its relation to the principles of the common law as established by other cases. An examination of the authorities prior to Hochster *vs.* De la Tour will show that not only was it established that an act which rendered the performance of the contract absolutely impossible was in itself a breach (a doctrine so inherently reasonable that no one would dispute it), but that the doing of an act by either party which was wholly inconsistent with the obligation which he was under to the other was a breach, even though, as Sir Frederick Pollock puts it, it might in contingent circumstances become possible to perform the contract. It is not always clear

upon what theory these decisions were based. In the case of conditions annexed to grants of land, the theory seems to have been that the parties were entitled to have the estates kept "in the same plight," and in other covenants the act seems to have been considered, in the language of the old commentators, "contrary to the "intent of the covenant;" but whatever the theory, the doctrine was undisputed. Perhaps the earliest statement of it is that already referred to as cited by Sir Frederick Pollock, and which also appears in

Viner's Abridgment, vol. V., 224,

as follows:—

If a day be limited to perform a condition, if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broken. 21 Ed., 4, 55.

As if the condition be to enfeoff before Michaelmas; if before the feast he enfeoffs another, though he after repurchases, yet he cannot perform the condition. 21 Ed., 4, 55.

And in

Coke on Littleton, section 358,

is is said:—

In the same manner it is, if the feoffee charge the land by his deed with a rent charge before the performance of the condition, or be bound in a statute staple, or statute merchant, in these cases the feoffor and his heirs may enter, &c., *causa qua supra*, for whosoever cometh to the lands by the feoffment of the feoffee, they ought to be liable, and put in execution by force of the statute merchant, or of the statute staple.

And Sir Edward Coke adds:—

And here it is to be understood that the grant of the rent charge is a present disability of the feoffee, and therefore albeit the grantee doth bring a writ of annuitie and discharge the land of it, *ab initio*, yet the cause of entrie being once given by the act of the feoffee the feoffor may re-enter. And so it is if the grant of the rent charge were made for life, and the grantee died before any day of payment, yet the feoffor may re-enter.

The like law is of any judgment given against the feoffee wherein debt or damages are recovered.

In

Sir Anthony Main's Case, 5 Coke's Reps., 21*a*.

Sir Anthony Main leased certain lands to Scott for

twenty-one years, and covenanted that at any time during the life of Scott, upon surrender of the lease, he would make a new lease. Sir Anthony Main afterwards accepted a fine, by which he granted the land for eighty years, whereupon Scott brought an action of covenant without offering to surrender. It was held that Sir Anthony Main had broken his covenant. The decision of the court, as stated in the report, was as follows:—

1. That Sir Anthony Main had broken his covenant without any surrender made, for by the said fine levied by him for eighty years, he had disabled himself either to take a surrender or to make a new lease; and the law will not enforce any one to do a thing which will be vain and fruitless *lex nemini cogit ad vana seu inutilia peragenda:* but it would be vain to compel him to make a surrender to him who cannot take it: and although the lessee in this case by the words of the indenture ought to do the first act, *scil.* to make the surrender, yet when the lessor hath disabled himself not only to take the surrender, but also to make a new lease according to the covenant, for this cause the lessor's covenant is broken without any surrender made. *Vide* 32, E. 3. Barre., 264 and 21, E. 4. 55 a. If you are bound to enfeoff me of the manor of D. before such a feast, if you make a feoffment of the said manor to another before the said feast, you have forfeited your obligation, although you repurchase the land again before the feast, because you were once disabled to make the feoffment. And therewith agreeth Temp., E. 1, Covenant, 29. If a man leases a manor for years, and covenants to keep the houses of the manor and as much as was in the manor in as good plight as he found them, during the term; the lessee committed waste in the houses, and in cutting of oaks, the lessor brought an action of covenant before the end of the term for the oaks, because for them it was impossible that the covenant should be performed: otherwise it is of the houses; and therewith agree F. N. B., 145, 7 and 12, E. 3 Lit., Covenant 2.

In the case of

Griffith *vs.* Goodhand, Sir T. Ray, 464.

the plaintiff brought an action of covenant, alleging that the defendant covenanted to sell and deliver to the plaintiff, for seven years from a certain date, seven parts of all the grains made in defendant's brew house. The plaintiff brought an action of covenant, assigning as a breach that the defendant, "with intention to deceive the plain-"tiff, did put divers quantities of hops into the malt of "which the grains were made, by reason whereof the

"grains were spoiled and became unprofitable to the plain-"tiff." The verdict was for the plaintiff, and it was moved, in arrest of judgment,

That this breach is out of the articles, namely, the putting the hops into the grains, and the damages being entire, the plaintiff ought not to have judgment.

Judgment, however, was given for the plaintiff.

In the case of

Bowdell *vs.* Parsons, 10 East, 359,

defendant had purchased from plaintiff twelve loads of hay, which he agreed to deliver to plaintiff upon request, as plaintiff might want it. After one load had been taken away and paid for, the defendant sold the remaining hay to other persons, whereupon the plaintiff brought suit and recovered a verdict. A motion was made in arrest of judgment, on the ground that the plaintiff had not sufficiently alleged a request. With regard to the argument that in one count of the declaration no request at all was alleged, Lord Ellenborough said:—

There is clearly a sufficient breach laid in that count, for by the defendant's selling and disposing of the rest of the hay to other persons he disqualified himself from delivering it to the plaintiff, and therefore no request was necessary.

In the case of

Amory *vs.* Brodrick, 1 Dow. & Ry., 361,

plaintiff declared on the covenant in an indenture by which defendant assigned a bond to plaintiff, and covenanted that he would ratify and confirm all actions which plaintiff might bring on the bond. The breach alleged was that defendant, prior to an action commenced by plaintiff, had released the bond. There was no averment that after the action was commenced he had been requested to confirm the action. On demurrer, the declaration was sustained.

Bayley, J., said:—

As to the first ground of demurrer I am clearly of the opinion that the breach is well assigned. The defendant covenants that he will avow, justify, maintain and support any action that may be brought. The plaintiff says you have not avowed, justified, maintained and supported

one action that I have brought, for you have disabled yourself from so doing by executing a release to Rowe. The substantial part of the breach is that the defendant had disabled himself from keeping his covenant, and that is a good breach to maintain the action.

Holroyd, J., said:—

I think that the objection first taken, that there is not a sufficient breach assigned, is not available. Here the party covenants to do a particular thing, and the breach assigned is that he has done an act whereby he has rendered himself incapable of doing that thing. That is a good breach.

In the case of

Ford *vs.* Tiley, 6 Barn. & Cr. (13 E. C. L., 154) plaintiff and defendant entered into an agreement, dated January 23, 1824, that the defendant should, at plaintiff's expense, with all possible speed after he should become possessed of or in possession of a certain public house, execute a lease thereof, from the 21st of December, 1825, for fourteen or twenty-one years, at a certain yearly rent. At the time of this agreement, the house was out upon a lease which would not expire until midsummer, 1827, and the legal estate was also vested in trustees, in trust, by lease or mortgage to raise money to pay debts, and then to pay to Betty Tyler £25 per annum for her life. On June 24th, 1825, during the existence of the outstanding lease, and also during the lifetime of Betty Tyler, the defendant joined with the trustees in making a new lease to a stranger for twenty-three years from September 29th, 1825, whereupon the plaintiff brought *assumpsit* to recover from defendant damages for a breach of the contract to give him a lease when defendant should obtain possession. A verdict was rendered for plaintiff, but the question as to whether the action was brought prematurely was reserved. The court (Bayley, J., delivering the opinion) said:—

It was objected at the trial, and the question was saved, whether the action was not premature, on the ground that the lease, which was in *esse* at the time of the agreement, would not have expired till midsummer, 1827, and was still, as to these parties, to be deemed a subsisting lease; but though we are satisfied that that lease is, as between these parties, to be considered as subsisting, and that the defendant cannot hitherto have been taken to have been possessed, and has never had a

right to have the possession, we are of opinion that the action is maintainable, because, by the lease of June, 1825, the defendant has given up his right to have the possession, and has put it out of his power, so long as the lease of June, 1825, subsists, to grant the lease he stipulated to grant. It is very true, the defendant may obtain a surrender of that lease before midsummer, 1827, and then he will be in a condition to grant the lease he stipulated to grant; but the obtaining such a surrender is not to be expected, and the authorities are that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives. In 1 Roll. Abr., 248, pl. 1 (Vin. 225), it is said: "If a day be limited to perform a condition, if the obligor once "disables himself to perform it, though he be enabled again before the "day, yet the condition is broken: as if the condition be to enfeoff an- "other before Michaelmas; if, before the feast, he enfeoff another, "though he after repurchases, yet he cannot perform the condition"; and he cites 21 Edw., 4, 55, where Choke, who was then one of the justices of C. B., so lays it down. The same may be collected from Co. Litt., 221*b*, where, upon a feoffment on condition to re-enfeoff, on payment of a certain sum by the feoffor or his heirs before a certain day, a distinction is taken between a disability in the interim, on the part of the feoffor or his heirs, and a disability on the part of the feoffee, a removal of the disability before the day from the feoffor or his heirs, entitling them to require a reinfeoffment, and the removal from the feoffee being no saving to him of the consequences of a breach; and Lord Coke adopts Littleton's reason, "maintenant by disability of the feoffee the "condition is broken, and the feoffor may enter." Now if the feoffment of a stranger before the day be a breach of a condition to enfeoff J. S. at a given day, the granting of a lease to a stranger before the day will be the breach of a contract to grant a lease to J. S. at a given day, and, *a fortiori*, will it be a breach so long as the lease to such stranger remains in force. In this case, therefore, where the defendant has contracted to grant the plaintiff a lease as soon as he is possessed or in possession, and he will be entitled to the possession as soon after midsummer, 1827, as Betty Tyler, the annuitant, shall die, and he has created a present disability in himself to grant such lease, if Betty Tyler shall die before the term to have been inserted in such lease would have expired, we are of opinion that the defendant's contract was broken by his joining in the lease of 1825; and, therefore, that the rule for a nonsuit cannot be made absolute. It appears to us, however, that the damages, to the extent to which they have been given, cannot be supported; and we think (unless the parties can agree) that there ought to be a new trial, that the rule by which the damages should be regulated may be more distinctly laid down to the jury. The damages upon the first count certainly cannot be supported, for that is founded upon the supposition that the defendant might have been possessed if he would; whereas,

without the consent of the trustees, he had no right at law to possess till midsummer, 1827, and the death of Betty Tyler. The second or third counts may be supported, in respect of that part of them which charges that the defendant has run from his agreement, because we think his destroying his chance of the right of possession is running from his agreement; but then the measure of damages should be, not the value of a lease for fourteen or twenty-one years, from December, 1825, but the value of a lease for so much of that term as, upon a calculation of the probability of the period of Betty Tyler's death, would be likely to be subsisting at the arrival of that period. The rule for a new trial must, therefore, be made absolute.

In the case of

Short *vs.* Stone, 8 Q. B. (A. & E. N. S.), 358 (55 E. C. L.),

the action was in *assumpsit*, and alleged that the defendant had promised the plantiff to marry her within a reasonable time next after he should thereunto be requested, and that the defendant, disregarding his promise, had married another person. There was a plea by defendant that he was not at any time before the commencement of the suit requested by plaintiff to marry her. To this plea plaintiff demurred. The case was elaborately argued on both sides. The four judges delivered separate opinions, as follows:—

Lord Denman, C. J.: We must look at this case with a view to the feelings and intentions of the parties at the time of entering into such a contract, and the intention clearly is to marry in the state in which the parties respectively are at the time. If either party puts himself out of that state he must be taken to dispense with the contract so far that the other may have an action against him without a request to marry. It is unnecessary to inquire what cases, among those which have been mentioned, are analogous to this, because here the intent must be considered; and, looking to that, the fact stated on the record is a necessary dispensation. According to this, which appears to me the true construction of the contract, the plaintiff shows a good right of action and is entitled to judgment.

Patteson, J.: The only difficulty I had was on the averment of a promise to marry within a reasonable time after request. If the allegation had been of a promise, generally, to marry, or a promise to marry on request, or in a reasonable time, the application of the case in Lord Raymond would have been clearer. But, on consideration, I do not see any rational distinction between the averments of a promise to marry on request and a promise to marry in reasonable time after request. We must look to the intention; and if a party puts himself out of the condition in which a request could properly be made, he dispenses with the

request. Here it is alleged that the defendant married another person. It was not necessary to show that that person was living when the action was commenced; here was a breach of contract, at once, when the defendant married.

COLERIDGE, J.: The declaration is good, and the plea bad, for the same reasons. The promise to marry within a reasonable time after request must mean after request within a time when it might reasonably be made. If the defendant disables himself from fulfilling such a request, then, in the first place, he dispenses with the request, because it has become impossible to make the request effectually; and, secondly, he has broken his own contract, because he is no longer able to fulfill that. It is no matter how long the person whom the defendant has married lives, the contract having been once broken; and the averment of a request to fulfill it is immaterial.

WEIGHTMAN, J.: I am of the same opinion. The facts stated in the count show a dispensation with the request to marry.

In the case of

Lovelock *vs.* Franklyn, 8 Q. B. (A. & E. N. S.). 371 (55 E. C. L.),

the action was in *assumpsit* upon a promise to assign all the defendant's interests in certain premises to the plaintiff within seven years from a certain date, and the breach alleged was that within the seven years the defendant conveyed the premises to another. There was a demurrer on the ground that the mere transfer to a stranger was not in itself a breach. The judgment was for the plaintiff, the court saying:—

LORD DENMAN, C. J.: The plaintiff has a right to say to the defendant: "You have placed yourself in a situation in which you cannot perform what you have promised. You promised to be ready during the "period of seven years; and during that period I may at any time "tender you the money and call for an assignment, and expect that you "should keep yourself ready; but, if I now were to tender you the "money, you would not be ready." That is a breach of the contract. No case contradicts this view; the language in the authorities relied upon by the defendants relates to a different state of things. Where a party agrees to sell, or to lease, on a given future day, he may have all the intermediate time open to him for acquiring the means of performing his contract; but here the party puts it out of his power to perform what he has agreed to perform; that is, to assign at any time at which he may be called upon. This distinction shows that the passage cited from Lord Coke is inapplicable; that proves no more, on the point now before us, than that, if an act is to be performed at a future time specified, the con-

tract is not broken by something which may merely prevent the performance in the meantime. We are introducing no novelty. In all the cases put for the defendants the party had the means of rehabilitating himself before the time of performance arrived; here he has incapacitated himself at the very time when he may be called on and should be ready.

PATTESON, J.: In this particular contract the defendant has undertaken to keep himself ready for the whole time, but he has parted with all his interest and has made it impossible for himself to perform if now called on. Coleridge, J., concurred.

The law was the same on this side of the Atlantic. In the case of

Newcomb *vs.* Brackett, 16 Mass., 161 (decided in 1819),

A. agreed to convey land to B., as soon as B. should pay the residue of a debt to him. Before B. had paid or tendered the residue of the debt, A. transferred the land to another party, whereupon B., without tendering the balance of the debt, or requesting a deed, brought suit against A. There was a demurrer, on the ground that the declaration did not show either payment of the residue of the debt or demand for a deed; but the court held that the transfer by A. to a stranger was in itself a breach. Chief Justice Parker, delivering the opinion, said:—

It is implied in the contract, on the part of the defendant, that it would do nothing by which he should become unable to perform it; and by making a deed to another person he has disabled himself, and so virtually broken his contract. It being impossible for him, after having thus done, to account for the $200 in the land, as he undertook, there is a breach of his contract, for which proper damages may be recovered. The law will not, in such circumstances, require a payment or tender by the plaintiff; for this would be to hazard an additional loss, without any possible advantage.

This opinion is supported by several decided cases, which are collected by Mr. Metcalf in a note to the case of Raynay *vs.* Alexander, in his valuable edition of Yelverton's Reports, page 76. The case in the text is: The plaintiff declared upon a promise to deliver, on a particular day, fifteen out of seventeen tods of wool, to be chosen by the plaintiff, upon payment of £6, and averred that he was ready to pay the £6 on the day, yet the defendant had not delivered the wool. Verdict for plaintiff, and judgment arrested, because not averred that the plaintiff had chosen the fifteen tods out of the seventeen, which was a condition precedent. But Popham, C. J., said, if the defendant had sold one of

the tods of wool before the election made by the plaintiff, that he had destroyed the election and made the promise absolute, and had been a breach of it. The same law, if the defendant would not have permitted the plaintiff to see the wool, that he might make election; for that had excused the act to be done by the plaintiff, and had been a default by the defendant.

Prior to the decision in Hochster *vs.* De la Tour it had also been settled that if a contract provided for a series of acts, and default was made in the performance of one of them, accompanied by an express or implied refusal to perform the rest, the other party was not only relieved from the duty of performing his part of the contract, but he might treat the default and refusal as a breach of the entire contract—not only of the particular act as to which default was made, but as to all the other acts which were to be done in *futuro*—and that damages might be assessed for the breach of the entire contract. Thus, in the case of

Cort *vs.* Ambergate, &c., Railway Co., 7 Q. B. (A. & E. N. S.), 127 (79 E. C. L.),

there was a contract for the manufacture of thirty-nine hundred tons of railway chairs, to be delivered in certain specified monthly quantities, from March, 1847, to November, 1847, and from January, 1848, to May, 1848. After a portion of the chairs had been delivered, the defendants, on January 31st, 1848, refused to further carry out the contract, or to accept any chairs. Plaintiffs brought suit, claiming damages for the entire contract. The defendants pleaded, *inter alia*, that the plaintiffs had not been ready and willing to carry out the contract, nor had defendants prevented and discharged them from supplying the residue of the chairs. There was a verdict for plaintiff. A motion for a new trial was made, upon the ground that the evidence showed that after the notice from the defendant, the plaintiff tendered no more chairs, and it was argued to the court that they were bound to make the tender. The court said:—

Upon the whole, we think we are justified, on principle and without trenching on any former decision, in holding that when there is an executory contract for the manufacturing and supply of goods from time

to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract. * * *

We are likewise of opinion that in this case the damages are not excessive, as the jury were justified in taking into their calculation all the chairs which remained to be delivered and which the defendants refused to accept.

And in the case of

Elderton *vs.* Emmonds, 6 Man. Gr. & S., 160 (60 E. C. L.), affirmed on appeal, 4 H. L. Cas., 624, a case which had been decided by the Court of Exchequer Chamber in 1848 and which was affirmed in the House of Lords about the same time that Hochster *vs.* De la Tour was decided, it had been settled that where there was an employment by the year and a discharge before the end of the year, that discharge might be treated as in itself an immediate breach of the entire contract, and suit brought upon it alleging such breach in the pleadings. Mr. Justice Crompton, in his opinion in the House of Lords, said (page 645) :—

It seems to me quite too late to question the principle upon which so many actions have proceeded in modern times, and which is, that after a dismissal, the servant or party employed may recover such damages as a jury may think the loss of the situation has occasioned. * * *

The result of the modern authorities, as to the remedies of a servant wrongfully discharged, is well discussed in the passage in Smith's Leading Cases. He is said to have the election of treating the contract as continuing, and suing for damages for the breach by the discharge; or, of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the *quantum meruit* for the work actually performed.

And Mr. Justice Erle said (page 655) :—

The agreement for the services of an attorney, at an annual salary, appears to me to constitute the relation of employer and employed for not less than a year; and the breach shows that this relation was put an end to, contrary to the contract so understood. It follows, according to the general law relating to contracts, that an action lies for this breach of contract as soon as it has taken place, and that the measure of damages is an indemnity to the plaintiff for his loss by the breach.

As the law stood, therefore, at the time the case of Hochster *vs.* De la Tour came before the courts, it was well settled that there could be an anticipatory breach before the arrival of the time, or the performance of the condition, at or on which the contract was to be performed. In the case of a contract the time for the commencement of performance of which had not arrived, any act which rendered the contract impossible of performance, or which caused a present disability on the part of one of the parties, was such an anticipatory breach, and could be so pleaded in an action on the contract. It not only relieved the other party from performing, but also constituted a breach which gave him a right of action. It was said by Lord Campbell, in the course of the argument of Hochster *vs.* De la Tour (page 683):—

> It probably will not be disputed that an act on the part of the defendant incapacitating himself from going on with the contract would be a breach.

And in the case of a contract, the performance of which had actually been commenced, a default accompanied by a refusal, express or implied, to carry out the remainder of the contract, was an anticipatory breach of all the remaining provisions.

The real question before the court, therefore, in Hochster *vs.* De la Tour was not whether there could be a breach of contract before the time fixed for performance, but assuming that there could be such a breach, did the positive and absolute refusal to carry out the contract prior to the date of any actual default amount to such a breach? Was such conduct on the part of one party, if accepted by the other as a breach, equivalent to an act rendering the performance impossible, or creating a disability to perform? In all the preceding cases in which it had been held that there had been a breach before the time fixed for the commencement of performance, there had been some act done inconsistent with the contract. In Hochster *vs.* De la Tour there was no act, but in place

of it, a positive and unqualified refusal to carry out the contract. Was this within the reason of the rule of common law which recognized in certain cases the possibility of an anticipatory breach? This was the question for decision in that case, and this was the question argued by counsel. During the argument, the decision which was subsequently announced was foreshadowed by the remark of Mr. Justice Crompton. He said (page 685):—

> When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say: "Since you have announced that you will "not go on with the contract, I will consent that it shall be at an end "from this time; but I will hold you liable for the damage I have sus- "tained, and I will proceed to make that damage as little as possible by "making the best use I can of my liberty."

In delivering the opinion of the court, Lord Campbell, after pointing out that at common law, as already established, there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, proceeded to hold that since the only question was whether a positive and unqualified refusal by one party to carry out the contract ought to be considered in the same category as such anticipatory acts, it was more reasonable to hold that it ought. He said:—

> But it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement incon-

sistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion, and it would be more consonant with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant at the time of his renunciation had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July and August, 1852; according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case.

The decision thus reached has never been departed from, and is now the settled law of England. As has already been said, this decision involved no violation of any principle of the common law, nor was it contrary to any of the precedents. It was no new departure to say that there could be an anticipatory breach, or to say that damages might be assessed as the result of such a breach in advance of the time fixed for performance. Both these doctrines were familiar. The question was really not so much one of legal principle as of commercial convenience, and the decision reached was in the line of a long series of decisions, both before and after the case, to the effect that it is better to suffer some inconvenience in the assessment of damages than to delay the bringing of actions or require numerous actions upon contracts. The real point, therefore, to be determined in consider-

ing the soundness of cases like Hochster *vs.* De la Tour is not whether they violate the common law, for it is clear they do not, but whether they are reasonable and in accordance with the development of the law as applied to the transactions of commerce. Viewed in this light, it is submitted the doctrine of Hochster *vs.* De la Tour commends itself as "inherently reasonable," to quote the expression applied to it by Judge Hare. Conceding that the party who makes the absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party is willing to accept this position, what is to be gained by delay in bringing suit, and why should there not be a speedy action and settlement with regard to the rights of the parties? The law does not favor delay or multiplicity of actions. On the contrary, the convenience of the parties, especially in commercial transactions, is best served by speed and simplicity. No good reason can be suggested for any difference in this respect between the case of an unqualified refusal to perform a contract prior to the date fixed for its commencement and the creation of a disability to perform. So far as the rights of the parties are concerned, it would seem to be immaterial whether the party says I cannot or I will not; whether he says I have put it out of my power to perform, or I gave you notice that I do not intend to perform, nor can any logical distinction be suggested between a refusal to perform future acts to be done under a contract in course of performance and a refusal to perform the whole contract made before the time for commencement of performance.

A few examples may serve to illustrate what is here contended for.

Suppose a man owning an antique statue, of which but one copy is in existence, makes a contract with another to furnish him with a plaster cast at the expiration of three months, and at the expiration of a week destroys the statue without taking the plaster cast. No one could contend, under the authorities, that this did not con-

stitute an immediate breach of the contract, or that an action could not be brought at once for such breach. Suppose, however, instead of destroying the original statue, the contracting party gave notice in absolute and unqualified terms that he would not make the plaster cast, and that he should treat the contract as at an end. Would it not be equally reasonable to allow the other party to treat this as a breach, and if so, what could be gained by delaying the time of bringing the action? Whether the action was brought before or after the expiration of the three months, it would still be brought upon the breach occurring, in the one instance above cited, by the destruction of the statue; in the other, by the refusal to perform; and there would seem to be no logical reason why, if the breach occurred before the end of the three months, the action could not be brought before that time.

Or take the case suggested by Erle, J., during the argument of Cort *vs.* Ambergate, &c., Railway Company, already cited, as follows:—

> Suppose the contract was that plaintiff should send a ship to a certain port for a cargo, and defendant should there load one on board, but defendant wrote word that he could not furnish a cargo, must the ship be sent to return empty?

Lord Campbell's pithy remark upon this was:—

> If it were law, it would not be sense.

If, however, it was not necessary for the shipowner to send his ship, why should he be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract? Convenience and justice and common sense would all seem to be furthered by allowing the action to be brought at once.

Or, take an illustration afforded by the present case: Assuming that the ten separate papers called hop contracts were ten separate contracts made cotemporaneously by the parties, it would still be true that if the parties had

chosen, they could have written all of these contracts into one contract, upon one piece of paper and have made it in form what it was in substance: an agreement to supply hops for five years in certain installments. If this had been the form of the contract, the authorities are clear that when the default happened which actually happened in the present case, leaving two years' deliveries yet unfilled, an immediate action might have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the remaining two years. If, however, it is reasonable in such a case to allow a recovery, why not equally reasonable if the acts to be done in the future, and as to which there is an unqualified and positive refusal, are to be done in pursuance of so-called separate contracts, instead of in pursuance of one contract? There is no difference in the breach; there is no difference in the damage. There would be no difference in the method of trying the action or of assessing the damages. To say that in one case damages can be recovered in an immediate action, and that in the other case they can only be recovered in a series of actions strung along over a period of two years, would be to establish one of those artificial distinctions which merchants find it difficult to understand, and which are always to be avoided, unless required to preserve important legal principles.

SECOND.—THE DOCTRINE OF HOCHSTER vs. DE LA TOUR HAS BECOME THE SETTLED LAW OF ENGLAND AS APPLIED TO EXECUTORY CONTRACTS FOR THE MANUFACTURE OR SALE OF GOODS, AND HAS BEEN ALMOST UNIVERSALLY ACCEPTED BY THE COURTS OF THE UNITED STATES.

It is true that in the case of

Roper *vs.* Johnson, L. R. 8 C. P., 167-178,

Keating, J., speaks of Hochster *vs.* De la Tour as intro-

ducing a "novel doctrine," but the same judge in the course of his opinion says:—

> That case has been distinctly recognized on many subsequent occasions, and we must now assume it to be law.

And in the subsequent case of

Mersey Steel & Iron Co. *vs.* Naylor, L. R., 9 Ap. Cas., 434-443.

Lord Blackburn, speaking of the doctrine of Hochster *vs.* De la Tour, says:—

> That was settled in Hochster *vs.* De la Tour, in the Queen's Bench, and has never been doubted since, because there is a breach of the contract, although the time indicated in the contract has not arrived.

Whatever, therefore, may be the law on this side of the Atlantic, the doctrine that a positive refusal may amount to a breach of contract giving rise to an action before the time fixed for performance is now part of the common law of England, too firmly settled to be questioned.

It must be conceded, of course, that the law cannot be considered as settled in this country until this court has passed upon it, and that no authorities can be cited which are binding upon this court. It was said, however, by Mr. Justice Gray, delivering the opinion of this court in the case of

Norrington *vs.* Wright, 115 U. S., 188-206,

that

> A diversity in the law as administered on the two sides of the Atlantic concerning the interpretation and effect of commercial contracts of this kind is greatly to be deprecated.

And this remark is equally applicable to the question of what constitutes a breach, as it is to the interpretation of the contract. And it is also true that this court is always inclined, other things being equal, to preserve and not to disturb a doctrine which has become an accepted rule of law governing merchants in their transactions with each other.

Now, while it may be said with truth that the authorities in this country are not unanimous, and that the Supreme

Court of Massachusetts which has refused to follow Hochster *vs.* De la Tour, is a court whose opinion is entitled to the highest respect, it cannot be denied that the profession and the courts throughout the United States have very generally accepted the opinion in Hochster *vs.* De la Tour, and have treated the rule laid down in that case as an established principle of the common law. Some evidence of this may be found in the practical unanimity of the text writers; no distinction in this respect existing between the American and English authors, except that the latter frequently by a foot note or otherwise call attention to the Massachusetts decision as an exception to the general rule. The following citations may be quoted by way of illustration:—

A promisor, by absolutely putting it out of his power to fulfill a contract entered into by him, may make himself liable, without demand, from the time he thus incapacitates himself, even though the time for performance has not yet arrived. He may, for instance, expressly repudiate the contract, in which case he may be at once sued, though the other party, if electing to sue immediately for the repudiation, cannot afterwards insist on the performance. A party, also, disabling himself by selling to B. an estate he has agreed to convey next month to A., may be sued at once by A. And a party disabling himself from marriage to A. (to whom he is engaged), by marrying B., may be sued by A. without prior demand. It has also been held that on a contract to sell to the plaintiff all the starch manufactured by the defendant within a year, an action will lie immediately on a breach, without waiting for the expiration of a year. As will be hereafter seen, the delivery of goods may be conditioned on the supply of material by the other party, and so of a covenant to repair. "It may also be observed," to adopt the words of a learned Federal judge in 1882, "that in contracts for services, for mar-"riage, for deliveries of merchandise, if the principal, before the time "for performance arrives, renounces the contract, an immediate action "will lie."

Wharton "Law of Contracts," section 885*a* (1882).

Wrongful Rescinding—Refusal—One exercising the power, already spoken of, to rescind his contract without right—that is, declaring to the other party his intention not to abide by it—commits thereby a breach whereon the other may bring an immediate suit without demanding performance, which, by the terms of the contract, was to be in the future.

Bishop on the Law of Contracts, section 1428 (1887).

Breach by Renunciation Before Time Set for Performance.—The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time arrives; they have a right to the maintenance of the contractual relation up to that time as well as to a performance of the contract when due. Therefore, a renunciation or repudiation of the contract by one of the parties before the time for performance has come discharges the other, and if he so chooses, entitles him to sue at once for a breach.

Lawson on Contracts, section 440 (1893).

Before Performance is Due.—The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time for performance arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due. It is therefore settled by the great weight of authority that the renunciation of a contract by one of the parties before the time for performance has come, does not discharge the other unless the latter chooses to regard it as a discharge. If he chooses, he may so regard it, and at once sue for the breach. The discharge is optional with him. In a leading case on this point the defendant had engaged the plaintiff to enter into his service, the employment to commence at a future day; but before that time arrived, he wrote the plaintiff that he should not require his services. The plaintiff at once sued for the breach of contract, though the time for performance had not arrived, and the court held that he was entitled to do so. It was said by the court that "Where there is "a contract to do an act on a future day, there is a relation constituted "between the parties in the meantime by the contract, and that they "impliedly promise that in the meantime neither will do anything to "the prejudice of the other inconsistent with that relation." * * *

Though the rule as stated above is almost universally recognized, the Massachusetts court has held that a renunciation before the time for performance has arrived does not amount to a breach; that to render a person liable "for breach of an executory personal contract, the other "party must show a refusal or neglect to perform at a time when and "under conditions such that he did or might be entitled to require per-"formance."

Clark on Contracts, page 645 (1894).

A contract may be broken in any one of three ways: A party to a contract (1) may renounce his liabilities under it; (2) may by his own act make it impossible that he should fulfill them; (3) may totally or partially fail to perform what he has promised.

* * * * * * * *

The parties to a contract which is wholly executory, have a right to something more than a performance of the contract when the time

arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to the performance of the contract when due.

The renunciation of a contract by one of the parties before the time for performance has come discharges the other, if he so chose, and entitles him at once to sue for a breach.

Hochster *vs.* De la Tour is the leading case upon this subject. A. engaged X. upon the 12th of April to enter his service as courier and to accompany him upon a tour; the employment was to commence on the 1st of June, 1852. On the 11th of May A. wrote to X. to inform him that he should not require his services. X. at once brought an action, although the time for the performance had not arrived. The court held that he was entitled to do so. "When there is a contract to do an act on "a future day, there is a relation constituted between the parties in the "meantime by the contract that they impliedly promise that in the mean-"time neither will do anything to the prejudice of the other inconsistent "with that relation."

It would seem needless to imply a promise in order to give the plaintiff a right of action. A contract is a contract from the time it is made, and not from the time that performance of it is due; if this is so, it is needless and clumsy to introduce into every contract an implied promise that up to a certain period of its existence it shall not be broken.

FOOT NOTE BY AMERICAN AUTHOR: This is the general rule in the United States. Windmuller *vs.* Pope, 107 N.Y., 674; Kurtz *vs.* Frank, 76 Ind., 594; Remy *vs.* Olds, 88 Cal., 537; Kadish *vs.* Young, 80 Ill., 170, *contra;* Daniels *vs.* Newton, 114 Mass., 530.

Anson on Contracts, 8th edition (1895), with American notes, page 290.

The great weight of judicial authority in the United States supports the rule thus stated by the text writers.

In New York the Court of Appeals in
Burtis *vs.* Thompson, 42 New York, 246,
while applying the doctrine of Hochster *vs.* De la Tour to the case in hand, did not commit themselves to the adoption of that rule in all cases. In the case of
Howard *vs.* Daly, 61 New York, 362,
the doctrine was thoroughly discussed and approved by the judge who delivered the opinion, although the other judges concurred in the result on other grounds without

expressing their opinion on this point. In the subsequent case, however, of

Windmuller *vs.* Pope, 107 New York, 674,

it was apparently adopted to its full extent by the Court of Appeals. In that case the opinion of the court below was as follows:—

We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it and, by a sale of the iron to other parties, changed their position. Dillon *vs.* Anderson, 43 N. Y., 231; Howard *vs.* Daly, 61 *Id.*, 362; Ferris *vs.* Spooner, 102 *Id.*, 12; Hochster *vs.* De la Tour, 2 El. & Bl., 678; Cort. *vs.* Ambergate, &c., Railway Co., 17 Ad. & El., 127; Crabtree *vs.* Messermoth, 19 Ia., 179; Benjamin on Sales, sections 567, 568.

The judgment was affirmed *per curiam* without opinion in the Court of Appeals.

In Pennsylvania the question first came before the courts in an action in the District Court of Philadelphia, the opinion being delivered by Judge Hare.

Mountjoy *vs.* Metzger, 12 Am. Law Reg., N. S., 442.

The discussion of the case by this eminent jurist is extremely interesting. In the course of his opinion, speaking of the repudiation of the contract, he says:—

It cannot be said that such a refusal is a mere declaration of intention as distinguished from an actual breach. It is no doubt true that the parties have the whole of the last twenty-four hours during which to perform the agreement. Hence a buyer to whom the goods are offered at noon, may require the vendor to keep them in readiness till night, to give him time to procure and pay the purchase money. But an unquali-

fied refusal on his part is an irreparable breach which leaves no room for a subsequent change of purpose. It is an implied authority to the vendor to dispose of the property to the best advantage and charge the purchaser with the difference.

At the end of the opinion, in speaking of the doctrine in Hochster *vs.* De la Tour, he adds:—

The doctrine may, therefore, be regarded as established in England, and from its intrinsic reasonableness will in all probability prevail in the United States.

This prophecy has since been literally fulfilled. Since that time the doctrine has been repeatedly approved by the Supreme Court of Pennsylvania.

In the case of

Zuck *vs.* McClure, 98 Penna., 541-545,

the court said:—

A mere notice of an intended breach is not of itself a breach of the contract. It may become so if accepted and acted on by the other party. If the defendants had accepted the plaintiff's notice of breach contained in their letter of November 19th and acted upon it, there would plainly have been a breach of the contract.

And in the later case of

Hocking *vs.* Hamilton, 158 Penna., 107,

the court again approved the rule. The facts of this latter case were that the defendant agreed to buy from plaintiff fifty thousand tons of coal, in monthly installments of about four thousand tons per month, at a certain price per ton, the contract being a severable contract, under the doctrine of Scott *vs.* Kittanning Coal Co., 89 Penna., 231. After a portion of the coal had been delivered, the defendant repudiated the contract. He subsequently sent various orders to plaintiff for coal, which were filled, and for some of which he paid. Plaintiff then brought suit for the amount due for the unpaid bills of coal, and also for the failure to accept the full amount of coal under the contract. The defendant defended on the ground that under the contract, if it was enforced, payment for the coal shipped under it would not be due until after the

commencement of the suit. The court sustained the recovery, saying:—

In appellee's statement of his demand, after his claim for damages, he adds one for the delivery of thirty-seven hundred and one and a fraction tons of coal in December, 1888. It is contended that under the contract the payment for this coal was not due until after the suit was brought. The Referee finds as a fact that the appellants notified appellee that in August, 1888, the contract was terminated, and this finding is sustained by the evidence. As the contract was thus terminated prior to the suit, the appellee's right of action to recover not only damages, but the price of coal subsequently furnished, accrued.

In Campbell *vs.* Gates, 10 Pa., 483, it was held that one party having by letter refused to go on with the performance of the contract, the right of action for damages then accrued to the other party. In Lovell *vs.* Ins. Co., 111 U. S., 264, it is said by Mr. Justice Bradley: "Where one party to an "executory contract prevents the performance of it, or puts it out of his "own power to perform it, the other party may regard it as terminated, "and demand whatever damage he has sustained thereby." And in Am. & Eng. Encyclopedia of Law, vol. III., page 904, it is stated: "If, "before the time for the performance of a contract has arrived, one "party announce to the other that he does not intend to perform his "promise, the latter may treat the contract as broken, and bring an ac"tion immediately against the former for the breach. It is not necessary "that he should postpone his suit until the time for performance has "arrived."

As the contract was that of appellants, and as, by their refusal to perform, appellee was entitled to recover, as the damages as found by the Master were warranted by the evidence, and as the right of action had accrued at the time when the suit was brought, this judgment is affirmed.

The courts of Maryland have approved the doctrine of Hochster *vs.* De la Tour in the case of

Dugan *vs.* Anderson, 36 Md., 567.

Miller, J., delivering the opinion of the court, said:—

The defendant's first prayer denies the right of the plaintiff to recover damages for the alleged refusal of the defendant to take the plaintiff into partnership on the first day of March, 1871, under the contract alleged and sought to be set up, because the action was instituted prior to that time. The proposition thus announced by the defendant's prayer is a denial of the law of Hochster *vs.* De la Tour, 20 Eng. L. & Eq. Rep., 157, and of the English cases that have followed and sanctioned that decision. * * * The principle of this decision in cases to which it has been held applicable is, that there is a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. It is said that the promisee has an inchoate right to the performance of

the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having thus been broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause for action, and damages be assessed and recovered in respect of it, though the time for the performance may yet be remote. It is obvious that such a course must tend to the convenience of both parties, and though decisions ought not to be founded on grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, the promisee may in many cases avert, or at all events, materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or would have been diminished.

In the case of

Hosmer *vs.* Wilson, 7 Mich., 294,

the Supreme Court of Michigan, Christiancy, J., delivering the opinion, said:—

But it was claimed by plaintiff's counsel that no action could have been maintained on the special contract until fully performed and the engine delivered or tendered to the defendants; that the unqualified refusal of the defendants to take the engine when it should be completed was not a prevention of performance which would authorize the plaintiff to sue upon the contract on that ground. We think it was, and that such absolute refusal is to be considered in the same light as respects the plaintiff's remedy as an absolute physical prevention by the defendants. This view will be found fully sustained by the following cases: Cort *vs.* Ambergate Railway Company, 6 E. L. & Eq., 230; Derby *vs.* Johnson, 21 Vt., 21; Clark *vs.* Marsiglin, 1 Denio, 317; Hochster *vs.* De la Tour, 20 L. & Eq., 157.

In the case of

Crabtree *vs.* Messersmith, 19 Iowa, 179,

the Supreme Court of Iowa, Cole, J., delivering the opinion, said:—

The action was commenced on the twenty-third day of December, 1861. There was evidence introduced tending to show that by the terms of the original contract of sale the defendant had his option to pay for the machine in money or in grain, as he earned it with the machine, at any time by or before Christmas, 1861. The evidence also tended to show that the defendant had taken the machine back to plaintiffs and expressly renounced the contract of purchase under which he had taken possession of it, and left the State and did not return until after Christmas, 1861. The fourth instruction asked by the plaintiffs and given by the court was, in substance, that if the jury believed from the evidence that before this suit was commenced the defendant had declared that he would not retain or pay for the machine, and left the State without making provision for the payment, and did not return till after the time fixed for payment, that such acts were evidence tending to show an abandonment of the contract which would entitle the plaintiff to bring this suit before the expiration of the time fixed for the delivery of the grain. The defendant claiming that the suit was prematurely brought, relied thereon in the District Court as a defense to the action, and asked the court, in several instructions prepared by his counsel, which were refused, and which embraced the same idea in different phraseology, to instruct the jury that if this suit was commenced before the time had expired in which the defendant was to deliver the grain, then the plaintiff could not recover. The giving and refusing to give these respective instructions was not error. The rule of law is well settled, that if before the time of performance of the contract arrives the promisor expressly renounce the contract, the promisee may treat this as a breach of said contract, and may at once maintain an action in respect thereof. Chitty on Contr., 799; Hochster *vs.* De la Tour, 2 Ellis & B., 678; Avery *vs.* Bowden, 5 *Id.*, 714; Elderton *vs.* Emmons, 6 Com. B., 160; Bowdell *vs.* Parsons, 10 East., 359; Lamoreaux *vs.* Rolfe, 36 N. H., 33.

Followed in

McCormick *vs.* Basal, 46 Iowa, 235.

In the case of

Fox *vs.* Kitton, 19 Ill., 518,

the Supreme Court of Illinois, Breese, J., delivering the opinion, said:—

We are disposed to attach more importance under the circumstances of this case to the conduct and declarations of the defendant at Chicago

than his counsel seem to do, and are disposed to regard them as affording good grounds for prompt action on the part of the plaintiff and as conferring the right upon him of avoiding the contract altogether. The defendant had agreed for the season ensuing the nineteenth day of May to run the vessel in the Buffalo and Chicago trade, and pay over the net earnings as fast as earned to the plaintiff. His undertaking, it seems to us, is of that description, and falls under the class of cases to which we have been referred, where a party agreeing to do an act at a future day, and before that day arrives declares he will not keep his contract or do the act, that the other party may act on the declaration and bring the action before the day arrives. * * * We think the declarations of the defendant and his refusal at Chicago to accept the services of plaintiff's agent to procure a cargo for Buffalo, gave the plaintiff a right to consider the new contract as repudiated and justified him in taking possession.

Followed in

Follansbee *vs.* Adams, 86 Ill., 13.

And again approved, after elaborate consideration, and after reargument, in the recent case of

Lake Shore, &c., Ry. Co. *vs.* Richards, 152 Ill., 59 (38 N. E. Rep., 773),

in which case the court, Shope, J., delivering the opinion, said:—

Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or, by his act and conduct, shows that he has renounced it, and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party. And it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that the determination has been reached, and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract will not, of themselves, amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of contract. Kadish *vs.* Young, *supra*. As said by Bowen, L. J., in Johnstone *vs.* Milling, 16 Q. B. Div., 460; "Its real operation "appears to be to give the promisee the right of electing either to treat "the declaration as *brutum fulmen*, and holding fast to the contract to "wait till the time for its performance has arrived, or to act upon it, and "treat it as a final assertion by the promisor that he is no longer bound "by the contract, and a wrongful renunciation of the contractual relation

"into which he has entered. * * * If he does so elect, it becomes a "breach of contract, and he can recover upon it as such." Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating and the contractual relation ceases to exist, except for purposes of maintaining the action for the recovery of damages.

These views are amply sustained by numerous decided cases.

In the case of

Kurtz *vs.* Frank, 76 Ind., 594,

the Supreme Court of Indiana, Woods, J., delivering the opinion, said:—

* * * But if this were otherwise, and if by its terms the contract was not to have been performed until at a time subsequent to the commencement of the suit, yet if, before the suit was brought, the appellant had renounced the contract and declared his purpose not to keep it, that constituted a breach for which the appellee had an immediate right of action. Burton *vs.* Thompson, 42 N. Y., 246; Holloway *vs.* Griffith, 32 Iowa, 409; Frost *vs.* Knight, L. R., 7 Exch., 111.

In the case of

Davis *vs.* Grand Rapids School Furniture Co., 24 S. E., 630,

the Supreme Court of West Virginia, Holt, J., delivering the opinion, said:—

Instruction No. 4 was in effect that if the contract was binding, then the defendant had until the fifteenth day of August, 1893, in which to comply with the same, and no right of action could accrue to the plaintiff until the time which defendant had in which to comply had fully expired. This was properly refused, for the defendant had notified plaintiff that they did not intend to comply at all, and plaintiff had a right to take them at their word and sue for whatever damage the plaintiff thereby sustained.

In the case of

Remy *vs.* Olds, 88 Cal., 537,

the Supreme Court of California, Fitzgerald, J., delivering the opinion, said:—

The complaint shows upon its face that the action was brought subsequent to the written notice of the repudiation of the contract by the defendants, when the plaintiff was not in default, and after he had removed from and vacated, and the defendants had entered upon and taken posses-

sion of the premises heretofore mentioned. This constituted such a breach as authorized the plaintiff to immediately sue, without waiting for the time to arrive for the performance of the other conditions.

It has not been thought worth while to cite cases from State courts not of last resort, except in the single instance of Mountjoy *vs.* Metzgar, which was referred to in the brief of plaintiff in error.

In the Federal Courts the question first came up in 1853, in the case of

Greenway *vs.* Gaither, Taney, 227 (10 Fed. Cases, 1180),

upon an application to Mr. Justice Taney, sitting in Circuit in Maryland, to seal a bill of exceptions two years after the time for sealing it had elapsed. The case had been tried two years before the decision of Hochster *vs.* De la Tour, and the decision of the Circuit Court was apparently contrary to the rule laid down in that case. The judge who tried the case had refused the bill of exceptions on the ground that it was applied for too late, and had subsequently died. Upon the application to Mr. Justice Taney he refused to seal the bill, partly on the ground that under the circumstances it was too late to seal the bill, and partly on the ground that the case of Hochster *vs.* De la Tour could only be applied to contracts of the special character involved in that case. This opinion was delivered before Hochster *vs.* De la Tour had been approved, and followed in the subsequent cases, and before its rule had become settled as part of the common law.

In the subsequent Federal cases, with a single exception, the Federal judges have, like the judges of the State courts, adopted the rule in its broad construction.

The next case was the case of

Hancock *vs.* The N. Y. Life Ins. Co., 13 Am. Law Reg., N. S., 103 (11 Fed. Cases, 402).

This was a suit against a life insurance company, which, during the life of the person insured, repudiated the con-

tract. The case was tried in the Circuit Court for the Eastern District of Virginia, before Bond, Circ. J. The plaintiff's counsel contended that under the doctrine of Hochster *vs.* De la Tour, the plaintiff was entitled to a recovery. The court sustained this ruling, and a verdict was rendered for the plaintiff.

The next case was the case of

Grau *vs.* McVicker, 8 Biss., 13 (10 Fed. Cases, 996).

In that case Drummond, Circ. J., said:—

I think that the principles decided in the case of Hochster *vs.* De la Tour, reported in 20 Eng. Law & Eq., 157, are sound. That was a case where two parties made an agreement with each other by which one was to enter the employment of the other, and to perform a contract which was to commence on a day named. The plaintiff in the action agreed to be a courier of the defendant on the continent of Europe for a time, commencing on the 1st of June. Before that time arrived the defendant had notified the plaintiff that he would not perform the contract; in other words, that he did not want him as a courier. Thereupon, before the 1st of June, the plaintiff commenced an action against the defendant and recovered, and the question came up before the Court of Queen's Bench whether the action, under such circumstances, could be maintained. And the unanimous opinion of the court was that the action was maintainable, and on the ground that although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June, or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete, and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September as that the action could not be maintained for a breach prior to 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case and in this the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make, whether or not that contract is binding on him. There are frequent cases, where contracts run for years, and it would be unreasonable in such a case to require a party to

wait all the time before he could institute an action against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward, or may arise in consequence of the time not having come or not having expired should be considered in estimating the damages.

The next case was the case of

Dingley *vs.* Oler, 11 Fed. Rep., 372,

in which the question came before the Circuit Court for the District of Maine. The opinion of the court, approving and applying the doctrine of Hochster *vs.* De la Tour, was delivered by Lowell, Circ. J. In the course of that opinion he says:—

The defendants have unqualifiedly refused to ship the ice; this action may be maintained, though brought before the close of the season, if the doctrine of Hochster *vs.* De la Tour, 2 Ell. & Bl., 678, is to be followed. That doctrine is that in contracts for services, for marriage, for deliveries of merchandise, if the principal, before the time for performance arrives, renounces the contract, an immediate action will lie. Frost *vs.* Knight, L. R., 7 Ex., 111; Roper *vs.* Johnson, L. R., 8 C. P., 167; Crabtree *vs.* Messersmith, 19 Iowa, 179; Halloway *vs.* Griffith, 32 Iowa, 409; Fox *vs.* Kitton, 19 Ill., 519; Burtis *vs.* Thompson, 42 N. Y., 246; Howard *vs.* Daley, 61 N. Y., 362. These cases seem to me to be founded in good sense and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.

The judgment in this case was reversed in

Dingley *vs.* Oler, 117 U. S., 490,

but upon other grounds, the Supreme Court declining to express an opinion as to the doctrine of Hochster *vs.* De la Tour.

In the case of

Foss Schneider Brewing Co. *vs.* Bullock (16 U. S. Appeals, 311), 59 Fed. Rep., 83,

Taft, Circ. J., in delivering the opinion of the Circuit Court of Appeals, said:—

It is true that where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other contracting party may accept this as an anticipatory breach of the contract and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms; but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such and consider the contract at an end.

In the case of

Edward Hines Lumber Co. *vs.* Alley (43 U. S. Appeals, 1609), 73 Fed. Rep., 603,

the Court of Appeals for the Sixth Circuit recognized the doctrine of Hochster *vs.* De la Tour as in force. In that case there was a contract to manufacture and sell lumber, and to pay for it in installments within sixty days after portions of it were piled. The suit was brought within less than sixty days after the piling of the whole lumber, and the question was whether there had been a repudiation of the contract by the defendant prior to the time for performance. The Court of Appeals held that the Circuit Court properly instructed the jury:—

> That as a matter of law, the plaintiff in error by its letter of September 1st, had renounced the contract and had refused performance absolutely and unconditionally, and had therefore breached their agreement to receive not only the installment it was asked to receive at the time, but had committed a breach of the entire contract.

In the very recent case of

Marks *vs.* Van Eeghen (57 U. S. Appeals, 1491), 85 Fed. Rep., 853,

decided by the Circuit Court of Appeals for the Second Circuit, the court (Wallace, Circ. J.), delivering the opinion, said:—

> It was decided in Daniels *vs.* Newton, 114 Mass., 530, that the action does not lie before the expiration of the time of performance, and recently that case was followed in Clark *vs.* Casualty Co., 67 Fed., 222. The question has never been decided by the Supreme Court of the United States, and the observations in the opinions in Smoot's Case, 15 Wall., 36, and Dingley *vs.* Oler, 117 U. S., 490, 6 Sup. Ct., 850, were *obiter*. In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated, his right of action accrues at once. The latter, however, must elect whether he will treat the contract as terminated, or as still existing; and if he does not do so, his right of action for a breach can only rest upon the refusal of the other party to perform the existing contract according to its terms. The action cannot be maintained when the evidence to prove a renunciation of

the contract is equivocal or indeterminate. It is enough, however, if it appears that he has distinctly signified his intention to repudiate the contract. The English authorities in support of these propositions, beginning with the leading cases of Hochster *vs.* De la Tour, 2 El. & Bl., 678, are unanimous. Frost *vs.* Knight, L. R., 7 Exch., 111; Roper *vs.* Johnson, L. R., 8 C. P., 167; Johnstone *vs.* Milling, 16 Q. B. Div., 460. The doctrine of these authorities has been adopted and approved by the courts of this country in numerous adjudications. Brewing Co. *vs.* Bullock, 8 C. C. A., 14, 59 Fed., 83; Howard *vs.* Daly, 61 N. Y., 362; Ferris *vs.* Spooner, 102 N. Y., 10, 5 N. E., 773; Windmuller *vs.* Pope, 107 N. Y., 674, 14 N. E., 436; Nichols *vs.* Steel Co., 137 N. Y., 471, 33 N. E., 561; Fox *vs.* Kitton, 19 Ill., 519; Engesette *vs.* McGilvray, 63 Ill. App., 461; Railway Co. *vs.* Richards, 152 Ill., 59, 38 N. E., 773; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; McCormick *vs.* Basal, 46 Iowa, 235; Platt *vs.* Brand, 26 Mich., 173; Slors Co. *vs.* Smith, 11 Ohio, 312; Kalkhoff *vs.* Nelson, 60 Minn., 284-287, 62 N. W., 332; Davis *vs.* Furniture Co., 41 W. Va., 717, 24 S. E., 630.

In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated was signified by the prompt commencement of their action.

Against this current of authority there are in all four cases, two in the Federal courts and two in the State courts. One of them is the case of Greenway *vs.* Gaither, already cited. The other three are

Clark *vs.* National, &c., Co., 67 Fed. Rep., 222;
Daniels *vs.* Newton, 114 Mass., 530;
Stanford *vs.* McGill, 6 N. Dakota Reps., 536.

Of these, the case of Clark *vs.* the National, &c., Company, was a decision by a single judge on a motion for a new trial, and was based upon the decision in Daniels *vs.* Newton, and upon an assumption, which, it is submitted, was without warrant, that the opinion of the Supreme Court of the United States in Dingley *vs.* Oler, 117 U. S., 490, showed the disposition of that court to be strongly in sympathy with the views of the Supreme Court of Massachusetts.

The opinion in the North Dakota case of Stanford *vs.* McGill is an elaborate attempt to demonstrate that the general acceptance of the rule of Hochster *vs.* De la Tour in the United States rests rather upon a series *of dicta*

than upon decisions where the actual point was necessarily involved. So far as the court deals with the underlying principles, its reasoning goes too far, since it even intimates a doubt whether a refusal to perform amounts to a breach in cases where the time for the performance by the other party has arrived, a rule thoroughly established even in Massachusetts, which rejects the doctrine of Hochster *vs.* De la Tour.

The only important case of the four above mentioned is the Massachusetts case of

Daniels *vs.* Newton, 114 Mass., 530,

the opinion in which is generally cited as containing all that can be said in opposition to the decision of Hochster *vs.* De la Tour. A careful examination of the opinion will show that it rests upon two propositions, viz.:—

1. That until the time of performance arrives neither contracting party can suffer any injury which can form a ground of damages.

2. That the adoption of the rule of Hochster *vs.* De la Tour in cases of ordinary contracts would necessitate its adoption in the case of commercial paper.

Judge Wells, in his opinion, does not deny the advantage and convenience to the commercial world of applying the same rule of anticipatory breach to cases of renunciation of a contract before the time of performance as is applied to the renunciation of the remaining unmatured obligations of a contract while it is in course of performance, and in fact there can be no distinction on this point between the two classes. He rests his opinion wholly on the two propositions above mentioned.

As to the first proposition, viz.: That until the time for performance arrives neither contracting party can

suffer any injury which can form a ground of damages. Judge Wells, says (page 533):—

"An executory contract ordinarily confers no title or interest in the subject matter of the agreement. Until the time arrives when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right nor loss upon which to found an action.

And again at the close of the opinion (page 541):—

The plaintiff could require nothing of them until the expiration of that time, and no conduct on their part, or declaration, whether of promise or denial, could give him any cause of action in respect of that agreement of sale.

If this is true—if there cannot be a violation of right before the time fixed for performance—if no conduct of either party before that time can amount to a breach, then Hochster *vs.* De la Tour is not good law; but the statement is far from correct. There are many cases in which before the time fixed for performance one of the contracting parties may do that which amounts to a breach and forms a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the latter a cause of action for breach of the contract, and this is common sense as well as good law. If the reasoning in Daniels *vs.* Newton is sound, it is authority not only for the proposition that a contract cannot be broken by deliberate renunciation, but that it cannot be broken by an act which renders its performance impossible. There is no rule of law that a contract cannot be broken before the time fixed for performance, and this being so, the question is not whether there can be such a breach, but whether it is reasonable to construe an absolute renunciation of the contract as such a breach.

With regard to the second proposition, viz.: That to adopt the rule of Hochster *vs.* De la Tour necessitates its application to commercial paper, it may be said that this reasoning also proves too much, since it would be equally

fatal to the rule now well established, that after the time for the commencement of performance of a contract involving a series of acts, there may be an anticipatory breach of the whole series long before the time of maturity. For example, an executory contract for the sale and delivery of goods by installments may be broken as soon as the first is due, and damages recovered for the entire contract. Yet the courts have not found it necessary to extend this rule to the case of a note for the payment of money in installments. In the latter case, unless there is an express stipulation in the note, the default in the payment of one installment does not give rise to an action for the entire principal. Neither would the adoption of the rule of Hochster *vs.* De la Tour require the courts to apply the same rule to the case of an ordinary promissory note.

The truth is that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on an entirely different footing from executory contracts for the purchase and sale of goods. In the case of an ordinary money contract, such as a promissory note or a bond, the consideration has passed. There are no *mutual* obligations, and as these cases do not fall within the reason of the rule of Hochster *vs.* De la Tour they have been universally excluded.

The distinction is well expressed by Mr. Justice Peckham in delivering the opinion of the Court of Appeals of New York in

Nichols *vs.* The Scranton Steel Co., 137 N. Y., 471-487,

as follows:—

> It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed to deliver part of an aggregate and specified amount of property to another

who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract, or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing, to recover damages which the other may sustain by reason of this refusal.

It may be added with regard to Daniels *vs.* Newton that it is certainly contrary to the spirit both of the earlier and later Massachusetts decisions, if, indeed, it is not directly opposed to them. Reference need only be made to the cases of

Newcomb *vs.* Brackett, 16 Mass., 161;
Heard *vs.* Bowers, 23 Pick., 455;
Parker *vs.* Russell, 133 Mass., 74;
Whitten *vs.* New Eng. Ins. Co., 165 Mass., 343.

The result of the authorities in Great Britain and the United States may be summed up as follows:—

IN THE CASE OF A CONTRACT EXECUTORY ON BOTH SIDES—A PROMISE FOR A PROMISE—IF ONE PARTY BEFORE OR DURING PERFORMANCE WITHDRAWS HIS PROMISE, EITHER EXPRESSLY BY RENUNCIATION OR IMPLIEDLY BY AN ACT PREVENTING PERFORMANCE, THE OTHER PARTY MAY ALSO WITHDRAW HIS PROMISE, AND THE CONTRACT IS TERMINATED; BUT IN SUCH CASE, AS IT HAS COME TO AN END, NOT IN DUE COURSE BY PERFORMANCE, BUT THROUGH THE WRONGFUL ACT OF ONE PARTY, THE INJURED PARTY MAY SUE THE WRONGDOER FOR THE BREAKING OF IT.

THIRD.—THE SUPREME COURT OF THE UNITED STATES, WHILE IT HAS NEVER PASSED UPON THE QUESTION, HAS REPEATEDLY ADOPTED AND APPLIED THE PRINCIPLES UPON WHICH THE RULING OF HOCHSTER vs. DE LA TOUR IS FOUNDED.

In the case of

Smoot's Case, 15 Wallace, 36,

this court (Mr. Justice Miller delivering the opinion of the court) made the following reference to the case of Hochster *vs.* De la Tour:—

In the case of Phillpotts *vs.* Evans, 5 Meeson & Welsby, 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of wheat at the time of the notice or at the time of the tender. Baron Park said: "I think no action would have lain for the breach of the "contract at the time of the notice, but that plaintiff was bound to wait "until the time of delivery to see whether the defendant would then re-"ceive it. The defendant might have chosen to take it and would have "been guilty of no breach of contract. His contract was not broken by "his previous declaration that he would not accept."

And though some of the judges in the subsequent case of Hochster *vs.* De La Tour, 2 Ellis and Blackburn, 678, disapprove very properly of the extreme ground taken by Baron Park, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal, and must have been acted on by the plaintiff.

In the case of

United States *vs.* Behan, 110 U. S., 338, 346,

this court (Mr. Justice Bradley delivering the opinion) said:—

It is to be observed that when it is said in some of the books, that where one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained.

In the case of

Lovell *vs.* St. Louis Mutual Life Ins. Co., 111 U. S., 264,

a life insurance company terminated its business and transferred its assets and policies to another company, and the court held that this in itself constituted a breach of

contract for which the insured might sue, although the time for the performance of the obligations of the insurance company, to wit, the death of the insured, had not arrived. This court (Mr. Justice Bradley delivering the opinion) said:—

Our third conclusion is, that as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of United States *vs.* Behan, 110 U. S., 339, to which we refer. It is unnecessary to discuss it further here.

In the case of

Hinckley *vs.* Pittsburgh Steel Co., 121 U. S., 264, there was a contract by the defendant to purchase from the plaintiff rails to be rolled by the latter, and to be drilled as might be directed. The defendant refused to give directions for drilling, and at his request plaintiff delayed rolling any of the rails until after the time prescribed for their delivery, and then defendant advised the plaintiff that he should decline to take any rails under the contract. It was held that the plaintiff was not bound to roll the rails and tender them, and that his damages were not the difference between the contract and market price, but the difference between the contract price and the cost of manufacture. This court (Mr. Justice Blatchford delivering the opinion) said:—

The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails, and the

rule of damages applicable to the case of the refusal of a purchaser to take an existing article, is not applicable to a case like the present. The proposition that, after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the six thousand tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice.

In the case of

Anvil Mining Co. *vs.* Humble, 153 U. S., 540,

it was held that conduct of one party to the contract which hindered and prevented the other party from performing it not only relieved the other party from performance on his part, but in itself amounted to a breach of the contract entitling the other party to entire damages therefor. The rule is thus clearly stated in the opinion of the court below by Mr. Justice Brewer, as follows:—

It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about.

In the case of

Pierce *vs.* Tennessee, &c., R. R. Co., 173 U. S., 1,

this court held that on discharge from a contract of employment, the party discharged might elect to treat the contract as absolutely and finally broken, and in an action recover the full value of the contract to him at the time of the breach, including all that he would have received in the future, as well as in the past, deducting any sum that he might have earned, or might thereafter earn. In the opinion of Mr. Justice Gray it is said:—

> But the recent tendency of judicial decisions in this country in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation.

And further on (page 16):—

> The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into his service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract.

Other cases might be cited, but these are sufficient to show that this court has fully adopted the principles:—

First.—That where a party abandons a contract and puts it out of his power to perform it, an immediate right of action is given, irrespective of the time fixed for performance.

Second.—That in the case of a refusal to carry out a contract, the refusal is in itself a breach, and the damages are recovered for that breach, and not for the subsequent failure of the party to carry out the stipulations of the contract at the time appointed; and

Third.—That where it can be done, a party to a contract injured by the wrongful repudiation of the contract by the other, will be allowed to recover his entire damages once for all in a single action.

It is submitted that these principles are the foundation stones of the doctrine of Hochster *vs.* De la Tour. As soon as it is conceded that the acts or the declarations of one party to a contract which amount to an entire repudiation of the contract itself may in themselves constitute a breach, and do not merely excuse the other party from performance, it logically follows that an action may be maintained for such a breach, and this would be true whether the acts or declarations take place before the time for commencement of performance of the entire contract or merely before the time fixed for the performance of the portion of the contract remaining unperformed. In either case the action is for damages, not because the party broke his

contract by not doing the thing he promised at the time appointed, but because he broke his contract by wrongfully repudiating or preventing its performance before that time arrived. And if the renunciation of the unperformed and unmatured obligations of a contract in course of performance is in itself an immediate breach as to those obligations, giving rise to an action with a special measure of damages, it would seem to follow that the renunciation of the entire contract before the time fixed for commencement of performance is also a breach giving rise to a like action with a like measure of damages.

How close is the reasoning of this court in the cases cited, to the reasoning which led to the decision in Hochster *vs.* De la Tour may be seen by a comparison of the language of Mr. Justice Brewer in Anvil Mining Co. *vs.* Humble, with the language of Mr. Justice Crompton in Hochster *vs.* De la Tour.

Mr. Justice Brewer said:—

> Whenever one party is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words he may abandon it and recover as damages the profits he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.

Mr. Justice Crompton said:—

> When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say "since you have announced that you will not "go on with the contract, I will consent that it shall be at an end from "this time, but I will hold you liable for the damage I have sustained."

With regard to the question of damages discussed in the brief of the plaintiff in error, little need be said in addition to what has been said by the court below. The plaintiff in error's real contention is that the only measure of damages was the difference between the contract price and the market price at the place of delivery. This point

really rests upon the plaintiff in error's other proposition, that the action was premature. All the argument made by plaintiff in error as to the inconvenience and injustice of assessing damages in advance of the time fixed for performance applies just as much to actions on executory contracts, broken during the course of performance, as to actions upon executory contracts broken before the time for performance commences. If, either in the case of an executory contract repudiated during performance, or an executory contract repudiated prior to any performance, suit can only be commenced after the expiration of the time for complete performance, then the measure of damages is the difference between the contract price and the market price at the date of delivery. If, however, in either case suit may be brought before the time for complete performance, then the plaintiff in error's proposition is not correct if its meaning is that the court must wait until the date of complete performance before estimating the damages. If a suit may be commenced before the time for complete performance, it may, of course, be tried before that time, and in such cases it would be impossible to obtain in advance market quotations for a future date. The rule in such cases is to give to the plaintiff compensation based, as far as possible, upon the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.

In the ordinary contract for the sale of goods not specific, the loss is the profit which the seller would have made. This is usually measured by the difference between the contract price and the market value at the date of delivery, because:—

First.—If the vendor did not purchase the goods until the date of delivery, his profit would be the difference between the contract price and the market price at that date.

Second.—If the vendor purchased the goods prior to

the date of delivery, he could sell them at the date of delivery for the market price, and hence the measure of damages remains the same.

The rule as to market price, however, is not an arbitrary rule, but only applies in such cases because it is necessarily the best measure of the plaintiff's loss. Where, however, before the entire completion of the contract the vendee repudiates it, the damage must necessarily be ascertained in other ways. If the vendor was to manufacture the goods, and in the process of manufacture the contract is repudiated, he is not bound to complete the manufacture and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance.

Hinckley *vs.* Pittsburgh, &c., Co., 121 U. S., 264.

It is, of course, obvious that in such cases the manufacturer may actually obtain his profit before the time fixed for performance, and may recover on a basis of cost which might have been increased or diminished by subsequent events, but the party who broke the contract before the time for complete performance cannot complain, and takes the risk of loss of profit by such anticipation of the time.

If the vendor has to buy instead of to manufacture, the same principle prevails. He need not keep the goods on hand, or subsequently buy goods to fill the contract. He can show what was the value of the contract by showing for what price he could have made subcontracts, this price corresponding to the cost of manufacture in the case of a manufacturer. He, too, may receive his money earlier in this way, and may gain or lose by the estimation of his damage in advance of the time for performance, but, as was said by Mr. Justice Brewer, he has the right to accept the situation tendered to him, and the other party cannot complain.

The case of

Roper *vs.* Johnson, L. R., 8 C. P., 167,

cited by plaintiff in error, is not inconsistent with this view.

In that case it was held that the plaintiff was not precluded from recovering damages because he did not or could not show that he could have made a forward subcontract. Grove, J., says:—

> If there had been any materials here to show that at the time of the breach the plaintiffs could, without extraordinary trouble, have entered into a forward contract at the then market price, the jury might have taken them into consideration in mitigation of the damages.

The principle adopted by the court below was applied and elucidated by Mr. Justice Peckham in delivering the opinion of the Court of Appeals of New York in the case of

Nichols *vs.* The Scranton Steel Company, 137 N. Y., 471-487,

as follows:—

> We hold, however, that by the repudiation the plaintiff is absolved from the further delivery of iron under t[illegible]ntract, and that an action to recover damages arising from defendant's refusal to receive and pay for such iron may be at once commenced. We do not think the fact that some iron had been delivered, the time for the payment of which had not, by the terms of the contract, arrived when the suit was commenced, makes any difference.
>
> If it were not for a repudiation of the contract nothing could be recovered as damages for the iron not delivered, because by the terms of the contract such delivery and payment would not be due; but when the defendant does repudiate the contract, and refuse on its part to fulfill its terms, it cannot be heard to say that the other party must himself be bound by it, and must await the expiration of the term of credit provided for by it before any action can be maintained under it. The plaintiff does not recover the moneys as being the contract price strictly and technically, but as damages for the breach of the contract by the defendant. And those damages would be the present worth of the moneys payable under the contract at the time therein provided. Thus, if the moneys were to be due at the end of four months from the time when the iron was, by the terms of the contract, to be delivered, the measure of damages would be, in such case, the present worth of an obligation to pay money due at such a certain time.

For these reasons it is submitted that the court below committed no error, and that the judgment should be affirmed.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Defendants in Error.